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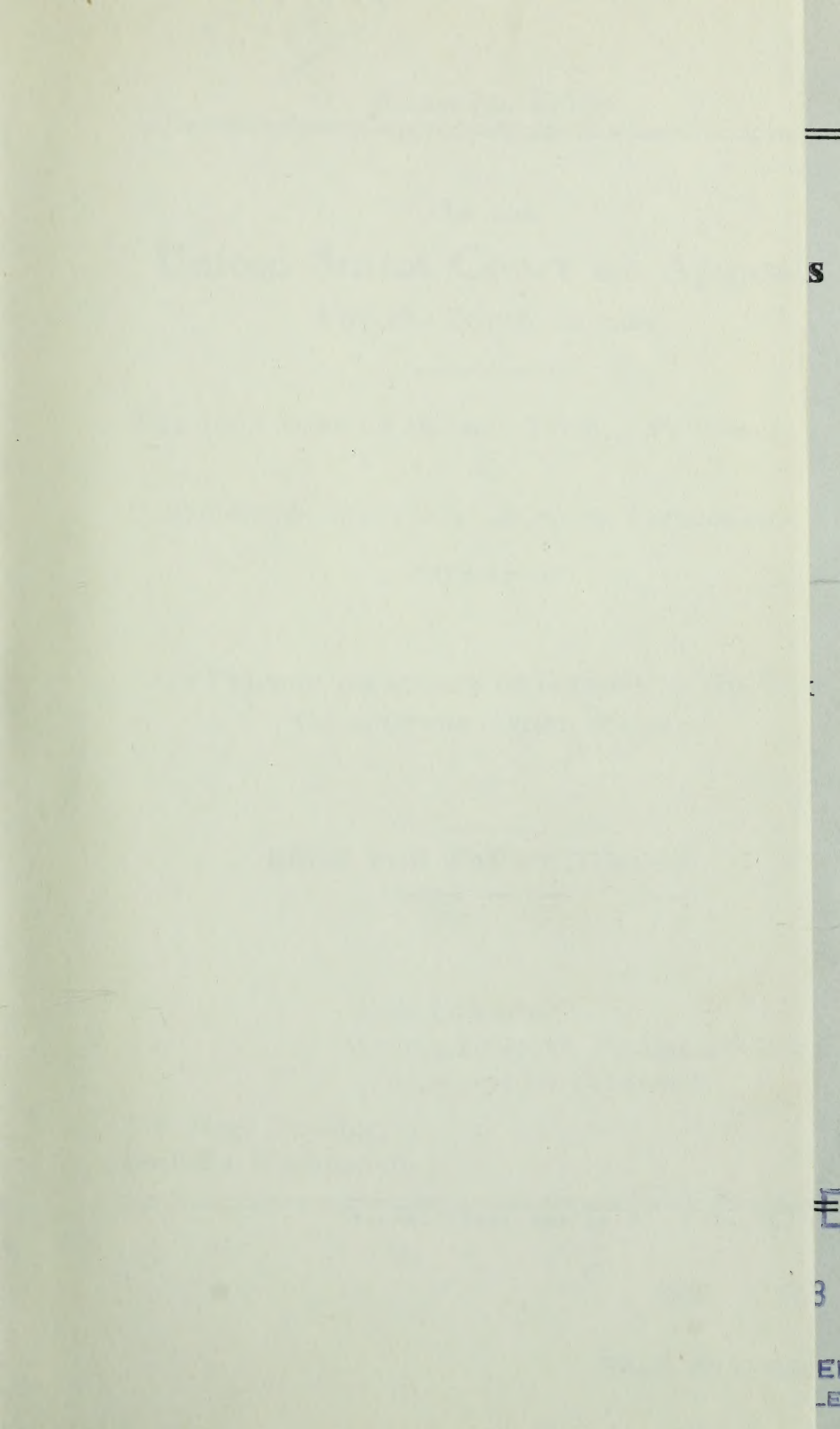
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**In the
United States Court of Appeals
For the Ninth Circuit**

THE JOHN DANZ CHARITABLE TRUST, *Petitioner,*
v.
COMMISSIONER OF INTERNAL REVENUE, *Respondent,*

ON PETITION FOR REVIEW OF DECISION OF THE TAX
COURT OF THE UNITED STATES

BRIEF FOR THE PETITIONER

F. A. LESOURD,
LITTLE, LESOURD, PALMER & SCOTT,
Attorneys for Petitioner.

1510 Hoge Building,
Seattle 4, Washington.

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In the
United States Court of Appeals
For the Ninth Circuit

THE JOHN DANZ CHARITABLE TRUST,
Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE,
Respondent,

Docket
No. 13608

ON PETITION FOR REVIEW OF DECISION OF THE TAX
COURT OF THE UNITED STATES

BRIEF FOR THE PETITIONER

This case involves questions as to the liability of an irrevocable charitable trust to pay income taxes. Appeals from decisions of the Tax Court in two cases, involving the same taxpayer but for different years, consolidated for trial before that court (R. 117), are likewise consolidated for consideration by this Court (R. 145).

OPINION BELOW

The opinion of Judge J. Edgar Murdock is found at R. 118, and is reported in 18 T.C. 454 under the name of *John Danz*. The opinion was not reviewed by the full Tax Court.

JURISDICTION

The jurisdiction of the Tax Court was based on I.R.C. §272. Notice of deficiencies for the years 1943, 1944 and

1945 was mailed to the petitioner on October 14, 1949, and petition for redetermination of the tax was filed with the Tax Court on January 9, 1950. The notice of deficiencies for the years 1946 and 1947 was mailed to the petitioner on March 5, 1951, and petition for redetermination of the tax was filed with the Tax Court on April 9, 1951. (R. 85.)

Jurisdiction of this court is based on I.R.C. §§ 1141 and 1142. The decisions of the Tax Court were entered on August 19, 1952. (R. 130, 131.) Petition for review by this court was filed in the Tax Court on September 11, 1952. (R. 131-133.) Venue in this court is established by I.R.C. §1141, and the fact that the returns of the tax in respect of which the liabilities arise were made to the Collector of Internal Revenue in Tacoma, Washington, within this circuit. (R. 109.)

STATUTES INVOLVED

The statutes involved in this case are set forth in the Appendix, *infra*, pp. 67-70.

QUESTIONS PRESENTED

1. Is an irrevocable trust, all of the corpus and income of which must go to exempt organizations, to be denied income tax exemption under I.R.C. §101(6) for the years 1943 through 1947 because, during those years, it operated temporarily, while attempting to find a lessee, a hotel which was part of a building purchased by the trust as a real estate investment and because, during those years, it operated three small candy shops as a means whereby volunteer services could be devoted to raising money for charity?

The Tax Court denied exemption.

2. Where the trust agreement irrevocably requires all corpus and income of the trust to be paid to exempt organizations, is the trust, in the years 1943 through 1947, to be denied the deduction granted by I.R.C. §162(a) (which provided for deduction of all income paid or permanently set aside for or to be used exclusively for exempt purposes), by reason of the fact that the trust agreement does not require the income to be distributed in the year earned, and the trust did not distribute all of its income each year but invested part of the income and used part of the income to pay off obligations previously incurred in the purchase of investment assets?

The Tax Court denied the deduction.

3. Did the filing by the charitable trust of returns under the provisions of I.R.C. §54(f), (providing for the filing of income tax returns by exempt organizations), for the years 1943, 1944 and 1945, showing the itemized income and disbursements of the trust, commence the running of the Statute of Limitations on assessment of tax contained in I.R.C. §275(a)?

The Tax Court held that the returns did not start the running of the Statute of Limitations.

STATEMENT

This case involves appeals from the decision of the Tax Court in two cases (being Docket Nos. 26404 and 33429 of that court), which were consolidated for trial and decision in the Tax Court and have been consolidated by order of this Court for hearing on appeal. Tax

Court Docket No. 26404 involves income tax imposed on the John Danz Charitable Trust for the calendar years 1943, 1944 and 1945, and Tax Court Docket No. 33429 involves income tax imposed on the same taxpayer for the calendar years 1946 and 1947.

Presented here are solely questions of law arising on the findings of fact of the Tax Court. These findings dealt not only with the two cases now before this Court, but also with certain other related cases wherein the Commissioner sought to tax the income of the John Danz Charitable Trust to the creators of that trust under the doctrine of *Helvering v. Clifford*, and sought to deny deductions to those who had made contributions to the trust. The Tax Court found against the Commissioner in these related cases and no appeal has been taken from those decisions. Since all of the cases were consolidated for trial below, part of the findings of fact are devoted to the issues in these other cases and are not pertinent to this appeal.

In its findings of fact, the Tax Court adopted as a part thereof all of the facts stipulated by the parties. Consequently, that stipulation and its attached exhibits have been designated for the record in this Court along with the findings of fact proper of the Tax Court.

The portions of the findings of fact proper of the Tax Court that are relevant to this appeal are as follows (R. 109-117):

John Danz has been engaged in the business of operating motion picture theatres in Seattle for about forty years. He concluded during the latter part of World War II that different ideologies were causing a great

deal of trouble and even had a tendency to create wars; the country was about ready for some philosophy with some common ground acceptable to everyone based upon science, pragmatism, experience and research that would eliminate all differences of opinion; but to get such an organization started in a large number of communities would require money. He and his wife created a trust on December 31, 1942 for the purpose of making and supplying money for that purpose. They called it "The John Danz Charitable Trust". John hoped to find some organization in the United States with a number of branches which could be helped with the trust funds to grow and educate the people. He did not know of any such organization at the time he created the trust and for that reason, reserved in the trust the right to designate the charitable beneficiaries of the trust.

John and Jessie, as grantors, transferred to the trustees by the trust instrument 900 shares of Sterling Theatres, Inc. common stock. John, William and Fredric Danz were named as trustees in the trust instrument. The trustees were given broad powers over the trust property, including the power to engage in business under various forms, to loan funds of the trust with or without security, to join in enterprises in which the trustees were personally interested provided that they exercised good faith in the interests of the trust estate, and, in investing or speculating, to combine funds of any trusts created by the grantors. The trustees were entitled to receive reasonable compensation for their services but received none during the taxable years. They were not to be personally liable, in the absence

of bad faith, for any losses from proper use of the trust funds. The grantors were not to derive and they have not derived, directly or indirectly, any benefit from the trust property.

John Danz was to have the right during his lifetime and by his will to designate the beneficiary or beneficiaries of the trust and to change, add, or withdraw beneficiaries which were to receive corpus or income of the trust at times and in amounts specified by him. Designations were to be in writing delivered to the trustees. Only a corporation or organization "of a type which is within the exemption from Federal income tax now granted by paragraph 101 of the Internal Revenue Code and in the event such exemption is hereafter restricted, then also within such restrictions" could be designated and the beneficiary also had to be of the type then specified in paragraphs 23(o), 812(d), and 1004(a)(2) of the Internal Revenue Code so that the contribution bequest or gift to such beneficiary would be deductible from income and exempt from estate and gift tax and in the event those classes were further restricted, then the beneficiary had to be within such restrictions. Named adult grandchildren or the trustees were to make similar designations covering any amount remaining in the trust after John's death and not covered by his will.

The trust was irrevocable but could be amended in certain respects by the joint action of William Danz, Fred Danz and Leslie Stusser. The power to amend did not include the power to change the beneficiaries or to make a change which would in any way benefit the grantors or their estates. Additional property could

be added to the trust. Leslie Stusser was to take the place of John Danz as trustee if occasion arose. Any other vacancy was to be filled by an appointment made by the remaining trustees. The trustees were to act through a majority. The trust instrument was to be governed by the laws of Washington.

Leslie Stusser was not related to or employed by any of the Danzes mentioned herein.

No amendments were made in the trust during the taxable years. John, William and Fredric Danz served as trustees of the trust from its inception throughout the taxable years. Books and records were kept for the trust. Title to all of the assets of the trust has been taken in the name of the trustees. Bank accounts were maintained for the trust.

John and Jessie Danz made additional contributions to the trust during the taxable years in cash, in stock of Sterling Theatres, Inc., and in stock of Sterling Theatres Company, Inc. William and Selma Jane Danz and Fredric and Selma Danz made cash contributions to the trust during the taxable years. The total contributions made to the trust during the taxable years, taken at the fair market value of each at the time it was made, amounted to \$109,542.00. The stock in Sterling Theatres, Inc. and in Sterling Theatres Company, Inc. held by the trust was a small part of the total outstanding stock of those corporations and played no part in the control or management of those corporations.

John Danz, after the creation of the trust, continued, at his own expense, to search for the type of organiza-

tion which he had in mind in forming the trust, and after several years of travel and search, he decided that there were groups of humanists which came close to what he had in mind. He was instrumental with others in starting such an organization in Seattle beginning in the early part of 1947. It was incorporated as the Humanist Society of Washington. Prior thereto and beginning in September 1946, he had designated "American Humanist Society", an organization which had a number of affiliates in different parts of the United States, as a beneficiary to receive funds of the trust in the total amount of \$11,500.00. He was also instrumental, along with others, in starting the Humanist Society of San Francisco and, after the taxable years, in starting the Humanist Society of Los Angeles. The first distribution from the trust to the Humanist Society of Washington was made on March 20, 1947. Thereafter during that year additional large distributions were made to it, to the Humanist Society of San Francisco, and to other charitable organizations.

The trust purchased 600 shares of stock of Midland Steel Products for \$17,691.64 in 1943 and sold those shares for a profit of \$4,583.62 in 1945. It bought and retained 500 shares of Anaconda Copper in 1945 and 1,500 shares in 1946, and in 1946, 1,000 shares each of Boeing Airplane Company, National Gypsum, and Westinghouse Electric at a total cost of \$161,154.25. It also held on December 31, 1947, donated shares of Sterling Theatres, Inc. and Sterling Theatres Company, Inc. which it carried at \$56,992.00.

The trust made the following purchases:

	<i>Cost</i>	<i>Year</i>
Savoy Hotel Property, including furnishings and fixtures.....	\$166,440.76	1943
Improved real estate Seventh and Pike	95,544.23	1943
Improved real estate Eighth and Pike	42,866.11	1943
Improved real estate Sixth and University	75,104.70	1946
Improved real estate, San Francisco	42,882.35	1947

It held the properties during the remaining taxable years and received rents therefrom, except that it sold the property at Eighth and Pike in 1946 at a profit of \$43,740.78. The Savoy Hotel property and the Seventh and Pike properties substantially increased in value during the taxable years. There was a mortgage on the Savoy Hotel building in the amount of about \$68,000.00 at the end of 1943. It was reduced \$21,676.00 during 1944, but by the end of 1945, it had been increased to about \$91,000.00. Thereafter, it was gradually reduced until it amounted to \$45,739.74 at the end of 1947. There was a mortgage on the Seventh and Pike property which amounted to \$44,860.04 at the end of 1943. It had been reduced to \$19,689.04 by the end of 1945 and was paid off in 1946. There was a mortgage on the Sixth and University property which amounted to \$54,582.22 at the end of 1946. It had been reduced to about \$45,000.00 at the end of 1947.

The trust borrowed money from John Danz and from Sterling Theatres, Inc. at 3 per cent during the taxable

years. John had to borrow money at interest rates in excess of 3 per cent to make the loans to the trust. The loans payable of the trust at the end of 1943 amounted to \$138,321.06. They were about \$4,000.00 less at the end of 1944 and amounted to about \$1,800.00 at the end of 1945. They amounted to \$109,000.00 at the end of 1946 and to \$89,500.00 at the end of 1947.

The trust purchased a retail candy shop on September 10, 1943 for \$1,514.75, another on September 22, 1943 for \$875.00, and a third on January 31, 1944 for \$1,500.00. It operated each shop after the purchase throughout the taxable years but at some undisclosed time thereafter ceased operating them. Each candy shop was adjacent to a theatre owned or managed by Sterling Theatres, Inc. Jessie Danz managed the three candy shops without pay because she wanted to make a contribution in that way to the acquisition of funds for the charitable trust.

The net worth of the trust, as shown on its balance sheets, increased from \$65,862.62 at the end of 1943 to \$448,420.09 at the end of 1947.

The average of the annual gross receipts from the Savoy Hotel for the taxable years was about \$141,000.00, the operating expenses about \$96,400.00, and the net income about \$44,600.00. The trust had additional income from rentals during the taxable years ranging from \$2,270.00 in 1943 to \$12,564.50 in 1945. The total sales of the candy shops during the taxable years were \$329,233.95, the net sales \$158,689.10, expenses \$106,435.75, and the net profits from the operation, including a small amount of income from telephones, were \$52,-

650.44. Dividends received by the trust during the taxable years amounted to \$23,458.10. The total net income of the trust for the taxable years, including profits on sales, was \$404,526.29.

The trust made no distributions in 1943. Thereafter, it made distributions to a number of organizations, exempt from tax under §101, of the types described in §§23(c), 512(d), and 1004(a)(2) of the Internal Revenue Code. The total of these charitable contributions was \$65,637.54, of which about two-thirds was contributed in 1947.

The Humanist Society of Washington occupied a large portion of the Sixth and University building rent-free from the time of the inception of that organization. The trust received rent from some other space in that building. The building in San Francisco was occupied rent-free by the Humanist Society of San Francisco.

The intention of the trustees in purchasing the Savoy Hotel property was to operate it only until the personal property could be sold and the real property leased to a hotel operator. Efforts were made to find such a lessee but no satisfactory arrangement was made until January 1, 1948. The hotel, at the time it was purchased by the trust, was being operated by a real estate company in Seattle, and that company continued to operate the property for the trust under an oral agreement during the taxable years and until January 1, 1948 when the furnishings were sold for \$60,000.00 and the real estate was leased to a hotel operator.

The following facts contained in the Stipulation

which was adopted by the Tax Court in its findings of fact are relevant to this appeal:

On September 19, 1946, petitioner filed with the Collector of Internal Revenue an exemption affidavit on Form 1023 together with returns on Form 990 for the calendar years 1943, 1944 and 1945 (R. 83; Joint Exs. 2A, 3C and 4D). The returns on Form 990 stated that they were required under I.R.C. §54(f) (Joint Exs. 2A, 3C and 4D). On these returns, petitioner set forth in detail for each year the amounts of contributions received, dividends and interest received, rents received, gross receipts from business activities (setting forth separately the gross receipts from the Savoy Hotel and from the candy stores), cost of goods sold, compensation paid, interest paid, taxes paid, other operating, administrative and overhead expenses paid, and contributions paid (R. 84-85; Joint Exs. 2B, 3C and 4D).

On July 3, 1947, pursuant to a ruling by the Commissioner of Internal Revenue that petitioner was not exempt, the Collector of Internal Revenue wrote to petitioner demanding the filing of income tax returns on Form 1041. On July 28, 1947, income tax returns on Form 1041 were filed by petitioner for the calendar years 1943, 1944, 1945 and 1946 (R. 84; Joint Exs. 6F, 7J, 8H and 9I). The returns were accompanied by a letter from Trustee William Danz stating that the returns were being filed in accordance with the Collector's request but that the Trustees did not agree that returns should be filed and believed that the Charitable Trust was exempt from tax (R. 84).

In each of the returns on Form 1041, petitioner

showed the income and expenses, took deductions for contributions paid during the year, and took a deduction in the amount of the balance of the income as constituting income which pursuant to the terms of the trust agreement, was permanently held and set aside for exempt purposes under I.R.C. §162(a) (R. 84-85; Joint Exs. 6F, 7J, 8H and 9I).

Petitioner has not engaged in any activities to influence legislation or carry on propaganda (R. 93).

On June 4, 1952, the Tax Court handed down its opinion to the effect that petitioner was not exempt under I.R.C. §101(6); that petitioner was taxable as a trust and not as an association; that petitioner was not entitled to a deduction under I.R.C. §162(a) for income not distributed during the taxable year; and that the returns on Form 990 for the calendar years 1943, 1944 and 1945 did not start the running of the Statute of Limitations (R. 128). Pursuant to this opinion, the Tax Court entered its decision on August 19, 1952 in Docket No. 26404 finding deficiencies in income tax against petitioner as follows:

1943	\$11,050.71
1944	50,955.97
1945	56,848.76

On the same date, decision was entered in Docket No. 33429 finding deficiencies in income tax as follows:

1946	\$38,837.34
1947	7,974.69

Also, the decision found a penalty under I.R.C. §291(a) in the amount of \$797.47 for 1947. (R. 130; 131.)

SPECIFICATIONS OF ERROR

Petitioner relies upon the following errors of the Court below:

1. The Tax Court erred in deciding that on its findings of fact petitioner was not exempt from Federal income tax under I.R.C. §101(6).

2. The Tax Court erred in deciding that on its findings of fact petitioner was not entitled to a deduction in computing its Federal income taxes of all of its income under I.R.C. §162(a).

3. The Tax Court erred in deciding that on its findings of fact the proposed Federal income tax deficiencies against petitioner for the years 1943, 1944 and 1945 were not barred by the Statute of Limitations set forth in I.R.C. §275(a).

4. The Tax Court erred in failing to enter a decision that there were no deficiencies in Federal income taxes due from petitioner for the years 1943, 1944, 1945, 1946 and 1947.

SUMMARY OF ARGUMENT

Petitioner was exempt from tax under I.R.C. §101(6) even though it had income from the operation of a hotel and small candy shops. The generally accepted rule is that exemption under this section is determined by the destination of the income, not the source. While this court has made no definite pronouncement on this point, nevertheless, in *Squire v. Students Book Corp.*, 191 F.(2d) 1018 (C.A. 9th) this court indicates that it will follow this general rule.

Even if the decision in *U. S. v. Community Services, Inc.*, 189 F.(2d) 421 (C.A. 4th), were thought to be correct (and we think it incorrect), petitioner would still be exempt. That decision holds that the 1950 amendments to §101(6) indicate legislative construction of §101(6) as not exempting organizations whose primary purpose was operation of a business enterprise. Petitioner, however, had no primary purpose of operating a business enterprise. The original contribution to petitioner consisted solely of securities, and the policy of petitioner's trustees was to invest in real estate and securities. The Savoy Hotel building was purchased as a real estate investment. Petitioner's trustees did not wish to operate the hotel and made efforts, finally successfully, to find a lessee. The three small candy shops, the investment in which was *de minimis*, were acquired as a means whereby the volunteer, uncompensated services of one of the grantors could be devoted to raising money for charity. The provisions and legislative history of the 1950 Act show that Congress not only understood but also continued to provide that I.R.C. §101(6) applied even though the organization was conducting

a business enterprise, where the enterprise was not the primary purpose of the organization.

Were petitioner not exempt under §101(6), still no tax would be due because petitioner would be entitled to deduct its entire net income under I.R.C. §162(a). The statutes, legislative history, regulations and decisions all are in accord to the effect that income earned and retained by an irrevocable trust for exempt organizations is permanently set aside during the taxable year and is deductible under the first clause of §162(a), even though not paid out to and not credited to any particular beneficiary during the year, and even though it is used to discharge corpus obligations or otherwise will be subject to the risks of investment. This deduction depends on the provisions of the trust instrument, not on any particular action of the trustees thereunder. Petitioner is also entitled to deduction of all of its net income under the second clause of §162(a) which contains no reference to setting aside during the taxable year, but permits deduction of any income to be used exclusively for exempt purposes. The decision below granting deduction under I.R.C. §23(o) to individuals contributing to petitioner is inconsistent with the denial of deduction to petitioner under §162(a).

Furthermore, the assessments for 1943, 1944 and 1945 are barred by the statute of limitations contained in I.R.C. §275(a). The returns on Form 990, pursuant to I.R.C. §54(f), were sufficient to start the running of the statute because they were returns filed under the provisions of the income tax law in good faith as the appropriate return thereunder, and they disclosed all

data necessary for assessment of any tax due. Any other result would deprive an organization, which in good faith is believed to be exempt, of the benefit of the statute of limitations.

ARGUMENT

I.

OPERATION OF HOTEL AND CANDY SHOPS DID NOT DEPRIVE PETITIONER OF EXEMPTION UNDER I.R.C. §101(6)

Exemption from tax under I.R.C. §101(6) (Appendix, *infra*, p. 69) was denied to petitioner by the Tax Court solely for the reason that, during the years involved, petitioner operated a hotel and candy shops. Operation of these enterprises, the Tax Court held, gave petitioner a purpose of making money which, in that court's view, meant that petitioner was not organized and operated "exclusively" for charitable purposes within the meaning of I.R.C. §101(6), even though the court held petitioner to be a valid, charitable trust, all the corpus and income of which was irrevocably required to go to charitable organizations.

A.

THIS COURT HAS INDICATED APPROVAL OF GENERAL RULE THAT DESTINATION, NOT SOURCE, OF INCOME CONTROLS IN DETERMINING EXEMPTION

This same issue, but involving charitable corporations rather than trusts,¹ has been the subject of considerable

¹ Both corporations and trusts are covered by the same language in I.R.C. §101(6). *Fifth-Third Union Trust Co. v. Commissioner*, 56 F.(2d) 767 (C.C.A. 6th).

recent litigation since the Tax Court in *C. F. Mueller Co.*, 14 T.C. 922, decided not to follow the previously generally accepted rule that the ultimate destination of the income controlled in determining exemption. The Fourth Circuit held to the same effect in *U. S. v. Community Services, Inc.*, 189 F.(2d) 421 (C.A. 4th). Nevertheless, the Third Circuit in *C. F. Mueller Co. v. Commissioner*, 190 F.(2d) 120 (C.A. 3d), reversed the Tax Court decision.

The problem raised by this position of the Fourth Circuit and Tax Court has already been considered by this court in *Squire v. Students Book Corp.*, 191 F.(2d) 1018 (C.A. 9th). There a business corporation, the stock of which was wholly owned by the Regents of a state university in trust for a tax exempt student's organization, operated a book store and restaurant on the campus. This court held the corporation to be exempt even though receiving income from business operations.

While it cannot be said that the *Students Book Corp.* case is precisely identical with that at bar, we believe it is determinative of the issue here. The difference between that case and this lies in the fact that the book store and restaurant which were operated by the Students Book Corporation bore, in the words of this court (191 F.(2d) at p. 1020), "a close and intimate relationship to the functioning of the college itself". Here, the hotel and candy shops bore no immediate relationship to the charitable objectives of the Trust. Nevertheless, it appears from the opinion in the *Students Book Corp.* case that the relationship of the business activity to the college was regarded as an additional reason for the ex-

emption rather than the turning point on which exemption was granted.

In the *Students Book Corp.* opinion, this court said (191 F.(2d) at p. 1020) :

Since the decision of the second circuit in *Roche's Beach, Inc. v. Commissioner*, 2 Cir., 96 F.(2d) 776, most of the circuits confronted with the problem appear to have applied the 'ultimate destination' test in determining whether the profits of a commercial enterprise are exempt under §101(6), or, to put the matter another way, if the only purpose of the enterprise is to devote its profits to charitable or educational ends the exemption has been usually held to attach. It has been thought that the exemption, unlike exemption statutes generally, should be liberally construed because of the gain to the public through the encouragement of charity. In two very recent decisions, reaching opposite conclusions, namely, *United States v. Community Services*, 4 Cir., 189 F.(2d) 421, and *C. F. Mueller Co. v. C. I. R.*, 3 Cir., 190 F.(2d) 120, the subject has been extensively reviewed and the authorities cited and discussed. We think it unnecessary again to plow this field, more particularly since Congress in the Revenue Act of 1950 has declared a different rule applicable for taxable years commencing after December 31, 1950.

In a footnote, this court then quotes the new provision in the 1950 Act which denies exemption to organizations operated for the primary purpose of carrying on a trade or business, but points out that Congress was careful to say that this provision should have no retroactive effect. Then in the body of the opinion, this court states that it has made no definite pronouncement

on the subject, although *Smyth v. California State Automobile Assn.*, 175 F.(2d) 752 (C.A. 9th), mentions with seeming approval some of the cases holding that it is the purpose to which the income is devoted which determines whether the exemption exists.

This court then states (191 F.(2d) at p. 1020):

Resolution of the case before us does not depend wholly on the ultimate destination of the taxpayer's profits.

The opinion then goes on to discuss the relationship of the business activity to the college.

Taking the opinion in the *Students Book Corp.* in its entirety, we think it fairly can be said that, while it does not constitute a definite pronouncement that the ultimate destination of the income alone determines exemption, nevertheless it does reflect this court's opinion that ultimate charitable destination of the income is persuasive of exemption and that this court is inclined to follow the test of exemption which was settled until the Tax Court attempted to change it in its decision in *C. F. Mueller Co.*, 14 T.C. 922.

After this court's decision in the *Students Book Corp. case*, the Court of Claims decided *Sico Co. v. U. S.*, 102 F. Supp. 197. The corporation there involved carried on a business of distributing petroleum products. The income was held for the benefit of the public schools. The Court of Claims held the corporation to be exempt on the ground that the destination, not the source, of the funds controlled, following the decision of the Third Circuit in *C. F. Mueller Co. v. Commissioner*, 190 F.(2d) 120, and refusing to follow the decision of the Fourth Circuit in *U. S. v. Community*

Services, Inc., 189 F.(2d) 421. Thus, there is today even further support for the view indicated by this court in the *Students Book Corp.* case.

Two other cases in which the Tax Court applied its view that the destination test should be abandoned are now on appeal. *Donor Realty Corp.*, 17 T.C. 899, is before the Second Circuit and *American Association of Engineers Employment, Inc.*, P-H Memo T.C. par. 52,062, is before the Seventh Circuit. Attempt by the taxpayer in *U. S. v. Community Services, Inc.* to bring the matter before the Supreme Court was met by a memorandum for the Government stating that the 1950 legislation had made the question completely academic after 1950, and partly academic before that time and that review could serve only to resolve the question in a narrow class of cases. Certiorari was denied. *Community Services, Inc. v. U. S.*, 342 U.S. 932, rehearing denied, 343 U. S. 911.

This brief will not be extended by a resume of the reasons for the adoption of the rule that exemption under I.R.C. §101(6) is determined by the destination of the income, nor by a review of the long line of cases supporting it.² The Third Circuit in *C. F. Mueller Co.*

² However, it is interesting to note that every case in which operation of a business has been thought to destroy the exemption of a charitable organization, up to the decision of the Tax Court in this case, was one involving a corporation, not a trust. The only decision involving this issue in connection with a trust, namely *Commissioner v. Orton*, 173 F.(2d) 483 (C.A. 6th), held that operation of a business enterprise did not take away the exemption granted by §101(6). In the case of an irrevocable, charitable trust, factors such as the certainty of devotion of the proceeds to

v. Commissioner, 190 F.(2d) 120 has covered this matter extensively, as has also the Court of Claims in *Sico Co. v. U. S.*, 102 F. Supp. 197, and this court is familiar with this background, as is shown by the opinion in *Squire v. Students Book Corp.*, 191 F.(2d) 1018. We submit that under these decisions, petitioner in this case is exempt from tax by reason of I.R.C. §101(6).

B.

PETITIONER WAS NOT ORGANIZED OR OPERATED FOR PRIMARY PURPOSE OF CONDUCTING A BUSINESS, AND THIS DISTINGUISHES *COMMUNITY SERVICES, INC.*, DECISION

In addition, we wish to point out that the situation at bar is distinguishable from that involved in *U. S. v. Community Services, Inc.*, 189 F.(2d) 421 (C.A. 4th), and petitioner is properly to be held exempt under I.R.C. §101(6) even if the Fourth Circuit were correct in that decision.

The corporate charter of *Community Services, Inc.*, and the facts surrounding its organization established that it was organized to take over and operate a business then being conducted by a private corporation, namely, a canteen refreshment service and retail sales of coal and ice. While the income was to go to charity,

the charitable objectives (as compared to a corporation, particularly a business corporation whose exemption is based on charter provisions which might be amended, and the stock transferred to a non-charitable purchaser), the control of the courts over the administration of the trust, and the fiduciary capacity of the trustees, all make it particularly inappropriate to hold that the exemption of a trust was destroyed by business activities.

there is no doubt that the corporation was to obtain that income from the conduct of a particular business enterprise previously conducted by the founder of the corporation. It can be said, therefore, that the basic purpose of that corporation at the time of its organization was to operate a particular business enterprise on behalf of charity.

From the *Community Services, Inc.* opinion, it is clear that by reason of these facts, the Fourth Circuit concluded that a primary purpose of the corporation was to operate a particular business enterprise, and this conclusion led to its holding that the corporation was not organized exclusively for charitable purposes. The court relied strongly on the provisions of the Revenue Act of 1950 (Pub. Law 814, 81st Cong., 2d Sess.) adding to I.R.C. §101 the following language:

An organization operated for the primary purpose of carrying on a trade or business for profit shall not be exempt under any paragraph of this section on the ground that all of its profits are payable to one or more organizations exempt under this section from taxation.

While this amendment was not effective during the tax years involved in the *Community Services* case (and was not effective during the tax years involved at bar), nevertheless, the Fourth Circuit felt that it was declarative of, rather than a change of, existing law and could be resorted to in interpretation of the meaning of §101(6) as it existed prior to 1950. See 189 F.(2d) at p. 427. That court thus concluded that §101(6) had never exempted organizations whose primary purpose was to operate a business enterprise and held *Community Services, Inc.* to be taxable.

In the case at bar, the findings of fact show no such primary purpose (nor even any material purpose) of operating business enterprises. The findings show that the original contribution to petitioner consisted entirely of securities, a traditional form of charitable trust investment, and these securities were not sold but remained as a permanent investment of petitioner. (R. 110.) This fact negates the existence at the time of creation of petitioner of any definite purpose of operating business enterprises. Later contributions to petitioner made by Mr. and Mrs. John Danz and others were all in cash or securities. (R. 112.) At no time was any business enterprise donated to petitioner, nor was any business enterprise of the founders or any other party connected with petitioner ever sold or conveyed to petitioner. Nor were there any strings attached to the gifts of cash and securities made to petitioner whereby petitioner was required to invest in or operate any business enterprise. Petitioner's trustees were entirely free to follow any investment policy they thought best. In considering whether there was a "primary purpose of carrying on a trade or business for profit", there is a marked difference between a case where an organization is created to operate a particular business enterprise and one where the directors of a charitable corporation or the trustees of a charitable trust were given funds with no strings attached on how they were to be invested, and where the funds could be invested in any way that the directors or trustees believed might be to the best interests of the charitable beneficiaries.

The Tax Court found that petitioner was created "for the purpose of making and supplying money" for

charitable organizations. (R. 110.) This finding is entirely consistent with a purpose of making the money through investment rather than through operation of business enterprises. The findings also point out that the Trust Agreement gave broad investment powers to the trustees, including power to conduct business enterprises. However, this is a common provision in creating a substantial charitable foundation in order to meet any contingency that might arise, and does not, of itself, establish that petitioner had as its primary purpose or even as any definite purpose, the operation of business enterprises.

The findings show that the policy decided on by the trustees of petitioner was to invest in improved downtown real estate and in common stocks. All the major investments made by petitioner followed this policy. The improved real estate investments through 1947 totaled \$422,838.15. The common stock purchases through 1947 totaled \$178,845.89. (R. 113-114.) These are traditional types of charitable foundation investment and they do not indicate any purpose, much less a primary purpose, of operating business enterprises.

The particular activities relied on in the Tax Court opinion to bring this case under the *Community Services, Inc.* decision were the operation of the Savoy Hotel and the candy shops. Regarding the Savoy Hotel, however, the Tax Court expressly found that the intention of petitioner's trustees was to operate the hotel only until the personal property could be sold and the real property leased to a hotel operator. The Tax Court further found that efforts were made to find such a lessee but no satisfactory arrangement was made until

January 1, 1948, when the furnishings were sold and the real estate leased. Moreover, the findings point out that petitioner did not operate the hotel directly during the years 1943 through 1947 but had a real estate company, which was operating the hotel when the building was acquired by petitioner, continue to operate the hotel for petitioner until the lessee was found. (R. 116-117.)

Regarding the candy shops, the Tax Court's findings are to the effect that Jessie Danz, one of the founders of petitioner, managed the candy shops without compensation because she wanted to make a contribution in that way to the acquisition of funds for the charitable trust. (R. 115.) Furthermore, the Tax Court's findings show that petitioner's investment in these shops was insignificant in light of its other investments. These candy shops were purchased for \$3,889.75, in comparison to investments in real estate and stocks totaling \$601,684.04.

We submit that when all of the Tax Court's findings of fact are considered, they not only fail to establish that petitioner was organized and operated for the primary purpose of operating business enterprises, but also they affirmatively establish that the operation of business enterprises was not even a material purpose of petitioner. The purpose of acquisition of the Savoy Hotel building was that of a real estate investment. Petitioner, at the time of acquisition of the building and at all times thereafter, desired *not* to engage in the hotel business and made continuing efforts to find a tenant-operator with eventual success. The purpose of acquiring the three little candy shops was so that Jessie Danz, one of the founders of petitioner, could

devote her volunteer services toward assisting the charitable objectives of petitioner. Use of small candy shops for this purpose is commonplace among charitable organizations. Moreover, it is *de minimis* as far as petitioner was concerned, the investment in these candy shops being only about six-tenths of one per cent of the total investments made by petitioner during the taxable years. Actually, a large part of the \$52,650.44 net profit earned by petitioner in the period 1943 through 1947 from these candy shops should be treated as a donation from Mrs. Danz, rather than as net profit earned from the conduct of a business enterprise, when one considers the reasonable value of Mrs. Danz' donated services for four and one-half years in managing these shops.

Every case with which we are familiar previous to that at bar, where it has been held that operation of a business enterprise destroys the exemption, has been a case where a corporation was organized for the purpose of taking over a particular existing business. In *C. F. Mueller Co. v. Commissioner*, 14 T.C. 922, it was a macaroni manufacturing business; in *Joseph B. Eastman Corp.*, 16 T.C. 1502, it was an automotive parts and service business; in *Donor Realty Corp.*, 17 T.C. 899, a realty business; and in *American Association of Engineers Employment, Inc.*, P-H Memo T.C. par. 52,062, an employment agency. These cases all may be said to bear resemblance to *Community Services, Inc.* in that the primary purpose on creation of the corporation was to take over and operate a particular business enterprise.

The importance of the distinction between charitable

organizations having as the primary purpose the operation of some business enterprise, and a charitable organization such as petitioner, which, although it happened to be operating business enterprises in the particular years here in question, did not have as its primary purpose the operation of business enterprises, appears when one considers the Revenue Act of 1950 which was relied upon by the Fourth Circuit in the *Community Services, Inc.* decision as showing legislative interpretation of the previous meaning of I.R.C. §101(6). The amendments made by the 1950 Act deprived a feeder charitable trust or corporation of the benefit of §101(6), for years after 1950, if it were operated for the primary purpose of carrying on a trade or business for profit. However, these same amendments made it clear that §101(6) still included an organization, even though it operated a trade or business, as long as the operation of that business was not the primary purpose of the organization.

Section 301(b) of the Revenue Act of 1950 (64 Stat. 906) amended I.R.C. §101 by adding at the end thereof the following paragraph:

An organization operated for the primary purpose of carrying on a trade or business for profit shall not be exempt under any paragraph of this section on the ground that all of its profits are payable to one or more organizations exempt under this section from taxation. For the purposes of this paragraph the term "trade or business" shall not include the rental by an organization of its real property (including personal property leased with the real property).

Section 301(c) of the same Act added to I.R.C. §101 another paragraph to follow the one just quoted. This second addition reads:

Notwithstanding supplement U, an organization described in this section (other than in the preceding paragraph) shall be considered an organization exempt from income taxes for the purpose of any law which refers to organizations exempt from income taxes.

Supplement U provides that in the case of certain exempt organizations having unrelated business income, the unrelated business income itself shall be taxable but the balance of the income of the exempt organization is not taxable. I.R.C. §§421-423, as added by the Revenue Act of 1950, §301(a). Supplement U is applicable only with respect to taxable years beginning after December 31, 1950. Revenue Act of 1950, §303. Unrelated business income is defined to mean income from a business the conduct of which is unrelated, aside from use of the income, to the exempt purposes of the organization. I.R.C. §422(b) as added by Revenue Act of 1950, §301.

It should be noticed that the language of subsection (6), I.R.C. §101, was not changed by the 1950 Act. If a charitable organization is within the application of §101(6) for years after 1950 even though it conducts business enterprises (as it clearly is under the above provisions as long as the conduct of the business is not the primary purpose of the organization) then Congress must have understood that the language of §101(6) as it existed prior to the 1950 Act was sufficient

to bring within its scope an organization that had business income.

By I.R.C. Supplement U, added by the 1950 Act, Congress imposed an income tax on that part of the income of exempt organizations which was derived from conduct of certain business operations. Supplement U applies, after 1950, to exempt organizations having business income where the operation of the business is not the primary purpose of the organization. Where operation of a business is the primary purpose of an organization, Supplement U does not apply because that organization is not exempt under I.R.C. §101, and is taxed on its entire income under the ordinary taxing provisions of the income tax act. Supplement U was a new tax on organizations regarded as exempt. Supplement U presupposes that the organization it applies to is exempt and that the income it taxes would be non-taxable were it not for the special tax imposed by Supplement U itself.

This quite evident meaning of the amendments made by the 1950 Act is confirmed by the committee reports on that Act. H. Rep. No. 2319, 81st Cong., 2d Sess., states in part III(e)(1) :

Your committee's bill imposes the regular corporate income tax on certain tax-exempt organizations which are in the nature of corporations and the individual income tax on tax-exempt trusts with respect to so much of their income as arises from active business enterprises which are unrelated to the exempt purposes of the organizations.

Your committee's bill does not deny the exemption where the organizations are carrying on unrelated active business enterprises or require that they dispose of such businesses but merely imposes

the same tax on income derived therefrom as is borne by their competitors.

S. Rep. No. 2375, 81st Cong., 2d Sess., states in Part VIII(A)(1) regarding Supplement U of the bill (U. S. Code Cong. Serv. 1950, Vol. 2, p. 3081):

In neither the house bill nor your committee's bill does this provision deny the exemption where the organizations are carrying on unrelated active enterprises, nor require that they dispose of such businesses. Both provisions merely impose the same tax on income derived from an unrelated trade or business as is borne by their competitors. In fact, it is not intended that the tax imposed on unrelated business income will have any effect on the tax-exempt status of any organization. An organization which is exempt prior to the enactment of this bill, if continuing the same activities, would still be exempt after this bill becomes law. In a similar manner any reasons for denying exemption prior to enactment of this bill would continue to justify denial of exemption after the bill's passage.

Both from the Revenue Act of 1950 and from its legislative history, it is evident, then, that Congress regarded I.R.C. §101(6) as granting exemption to an organization even though it conducted a trade or business. The 1950 Act expressly denied the exemption for future years in situations where the conduct of the business was the primary purpose of the organization. Whether this denial was a change in the meaning of I.R.C. §101, or merely declaratory of the meaning of that section as it had existed prior to 1950, is a point of dispute between the Third Circuit in *C. F. Mueller Co. v. Commissioner*, 190 F.(2d) 120, and the Fourth Circuit in *U. S. v. Community Services, Inc.*, 189 F.(2d) 421. We

believe that the Third Circuit's view that this denial was a change in the scope of §101 is correct. Nevertheless, if we take the Fourth Circuit's view that the 1950 Act is declaratory of the previous meaning of the section, the clear interpretation of §101 by the 1950 Act is that the operation of a business enterprise does not prevent an organization from being exempt under I.R.C. §101(6) unless the conduct of the business enterprise is the primary purpose of the organization.

The Tax Court's findings of fact establish that the operation of a business enterprise was not the primary purpose of petitioner. Consequently, petitioner is exempt from tax even assuming that the case of *U. S. v. Community Services, Inc.*, 189 F.(2d)421 (C.A. 4th), was correctly decided.³

II.

PETITIONER IS ENTITLED TO DEDUCTION OF ALL ITS NET INCOME UNDER I.R.C. §162(a)

Even if petitioner were not itself a tax exempt organization, nevertheless, no tax was due from it because it was entitled to a deduction under I.R.C. §162(a), (Appendix, *infra*, p. 69), for all income permanently set aside for, or to be used exclusively for, exempt organizations. Since petitioner is an irrevocable charitable trust, all of its net income is so held and is deductible.

Without citing any case which supports its position

³ Space will not be taken here to develop the additional distinction set forth in footnote 8 of the opinion in *C. F. Mueller Co. v. Commissioner*, 190 F.(2d) 120, (C.A.3d), which we believe is sound and on which we also rely.

(because there was no such case), the Tax Court denied the deduction on the ground that petitioner had not paid out to exempt organizations in each year the full amount earned in that year, there being no requirement in the trust instrument that it do so, and the unexpended balance was invested or used to pay off loans and interest thereon. The loans consisted of mortgages or money borrowed on trustees' notes incurred in connection with the making of the investments of petitioner, and the interest was paid on these loans.⁴ (R. 94-98, 99-100, 114-115.) The Tax Court stated that the entire income in any year could be invested or put back into any business enterprise carried on by petitioner, and concluded that the income for any particular year used for such purposes might never go to any charity because it might be lost in a business venture. The court further stated that an annual deduction is not allowed by §162(a) merely because the property of the trust must eventually go to charities. (R. 123-125.)

A.

IRREVOCABLE REQUIREMENT THAT ENTIRE FUND GO TO EXEMPT ORGANIZATIONS SUPPORTS DEDUCTION UNDER EITHER CLAUSE OF §162(a)

Contrary to the statement in the Tax Court opinion, an annual deduction of the entire net income of a trust was authorized by either and both clauses of I.R.C.

⁴ There is no question presented under §162(a) as to the interest since the interest is independently deductible and the deduction taken on the returns under §162(a) was of the net income after eliminating therefrom the amount paid out as interest.

§162(a), as it read during the years in question, where the trust instrument irrevocably required all corpus and income of the trust to go to exempt organizations.

During the years 1943 through 1947 which are here involved, I.R.C. §162(a) read as follows:

(a) There shall be allowed as a deduction (in lieu of the deduction for charitable, etc., contributions authorized by section 23(a)) any part of the gross income, without limitation, which pursuant to the terms of the will or deed creating the trust, is during the taxable year paid or permanently set aside for the purposes and in the manner specified in section 23(o), or is to be used exclusively for religious, charitable, scientific, literary, or educational purposes, or for the prevention of cruelty to children or animals, or for the establishment, acquisition, maintenance or operation of a public cemetery not operated for profit.

This section, of course, applies to trusts which are not tax exempt organizations, since tax exempt trusts would need no deduction.

It will be noticed that the language of the section contains two co-ordinate clauses, under either of which deductions may be taken. The first clause covers any part of the gross income which, pursuant to the terms of the trust instrument, is during the taxable year paid or permanently set aside for the purposes and in the manner specified in §23(o). The second clause covers any part of the gross income which, pursuant to the terms of the trust instrument, is to be used exclusively for stated exempt purposes. The deduction contended for by petitioner is, we believe, clearly allowable under the first clause of the section, and we believe, also, that

the deduction is authorized by the second clause of the section. In the opinion of the Tax Court, the first clause only of §162(a) is quoted.

1. Income of petitioner is by the trust instrument permanently set aside for charitable organizations under first clause of §162(a)

As the opinion of the Tax Court recognizes, the trust instrument in this case requires that all of the assets of petitioner, whether corpus or income, be held irrevocably for payment to charitable organizations qualifying under I.R.C. §23(o) (Appendix, *infra*, p. 67). This fact, in and of itself, constitutes a setting aside during the taxable year of all of the income of petitioner and gives petitioner the right to a deduction under the first clause of §162(a).

Several of the cases consolidated in the Tax Court with those at bar involved deductions under I.R.C. §23(o) by contributors to petitioner for the amounts of their contributions. Section 23(o) granted individuals deduction of contributions "to or for the use of" exempt organizations. Appendix, *infra*, p. 67. In its opinion in this case, the Tax Court allowed deduction for contributions to petitioner, holding that the words, "for the use of," conveyed a meaning similar to "in trust for" so that the contributions here made to petitioner—an irrevocable trust for exempt organizations—qualified under §23(o). R. 126. This holding is in accord with long-settled construction. *Schoellkopf v. U. S.*, 124 F. (2d) 982 (C.C.A. 2d); *H. H. Bowman*, 16 B.T.A. 1157 (Acquiescence IX—1 C.B. 6); I. T. 3707, C.B. 1945, p. 114.

The decision of the Tax Court on §162(a) is inconsistent with its decision on §23(o). The first clause of §162(a) grants a deduction to a trust of income “permanently set aside for the purposes and in the manner specified in §23(o).” Under the trust instrument here involved, the income received by petitioner was held for exactly the same purposes and in exactly the same manner as were donations received by petitioner. That these purposes and this manner were those specified by §23(o) was determined by the Tax Court in granting the deduction under §23(o).

Prior to 1917, the income tax law provided no deductions, either to individuals or to trusts and estates, for charitable contributions. Section 1201(2) of the Revenue Act of 1917 (40 Stat. 300) gave to individuals, and by reference also to trusts and estates, deduction up to 15% of net income for contributions actually made within the year to charitable corporations or associations.

As far as individuals were concerned, §214(a)(11) of the Revenue Act of 1918 (40 Stat. 1057) retained essentially the same provisions (except restricting the deduction to contributions made to corporations, eliminating associations). The 1918 Act, however, adopted a new section dealing with charitable deductions by trusts and estates. Section 219(b) of that Act provided (40 Stat. 1071):

* * * there shall also be allowed as a deduction (in lieu of the deduction authorized by paragraph (11) of subdivision (a) of section 214) any part of the gross income which, pursuant to the terms of the

will or deed creating the trust, is during the taxable year paid to or permanently set aside for the United States, any State, Territory, or any political subdivision thereof, or the District of Columbia, or any corporation organized and operated exclusively for religious, charitable, scientific or educational purposes, or for the prevention of cruelty to children or animals, no part of the net earnings of which inures to the benefit of any private stockholder or individual; * * *.

Attention is called to the following significant provisions of that section:

First, the new deduction is expressly stated to be a substitute for the deduction allowed individuals which had previously applied to trusts and estates.

Second, the new deduction is unlimited in amount as compared to a limit of 15% of net income imposed on individuals and previously imposed on trusts and estates.

Third, a trust or estate is entitled to a deduction for amounts permanently set aside for charitable corporations, whereas individuals were limited (as were trusts and estates under previous law) to deduction of amounts paid out.

Fourth, in order to secure deduction of amounts paid out during the year, the trust or estate must have paid the amounts directly to a charitable corporation and could not get a deduction for amounts paid to another charitable trust. The same was true of deductions claimed by individuals under §214(a)(11).

It is also significant in determining the construction of this section that the committee report makes no men-

tion of the phrase "during the taxable year." House Conf. Rep. No. 1037, 65th Cong., 3d Sess., p. 52, stated :

Amendment No. 94. This amendment allows, in the case of estates and trusts, a deduction for amounts which, pursuant to the terms of the will or deed creating the trust, are paid to or permanently set aside for religious, charitable, scientific, or educational purposes, or for the prevention of cruelty to children or animals; and the House recedes with amendments making clerical changes and confining the deductions to amounts contributed to or permanently set aside for governmental purposes or corporations organized and operated exclusively for religious, charitable, scientific, or educational purposes, or for the prevention of cruelty to children or animals, no part of the net earnings of which inures to the benefit of any private stockholder or individual.

Considering both the text of the section and the committee report, we believe that the intent of Congress in the case of trusts and estates was not only to eliminate the 15% restriction but also to eliminate the requirement that in order to get a deduction, the money must be paid out during the year where the will or trust instrument as it existed during the taxable year required that the income be held for and eventually paid to a charitable corporation.

The Revenue Act of 1921 (42 Stat. 227, 246) also made significant changes. Section 219(b) of that Act provided :

* * * except that (in lieu of the deduction authorized by paragraph (11) of subdivision (a) of section 214) there shall also be allowed as a deduction, without limitation, any part of the gross income

which, pursuant to the terms of the will or deed creating the trust, is during the taxable year paid or permanently set aside for the purposes and in the manner specified in paragraph (11) of subdivision (a) of section 214.

Here for the first time is found the reference to the "purposes" and the "manner" specified in the section granting charitable deductions to individuals. Also, the 1921 Act eliminates the word "to" following the phrase, "is during the taxable year paid * * *." The effect of the elimination of the word "to" is to permit deduction of amounts which are paid out during the year but are not paid *to* an exempt organization but are paid *for* such an organization. The most obvious example would be payments to an irrevocable trust for exempt organizations.

S. Rep. No. 275, 67th Cong., 1st Sess., p. 16, states that the amendments found in §219(b) of the 1921 Act were for the purpose of clarifying its provisions and making the interpretation thereof more definite and certain.

The Revenue Act of 1921 also changed the provisions for charitable deductions by individuals. Section 214(a)(11) of that Act added the words, "or for the use of," so that the section read:

Contributions or gifts made within the taxable year to or for the use of: (A) * * *.

Considering this change along with the simultaneous change made in §219(b) wherein the word "to" was eliminated, it appears that Congress decided that individuals and trusts and estates should all be allowed deductions for contributions made to an irrevocable

trust for exempt organizations. The language so adopted in 1921 continued through the years here involved.

Under this language, if there were in existence another charitable trust identical with petitioner in all respects and if petitioner contributed to this other trust all petitioner's income, petitioner would be entitled to a deduction therefor. This money in the hands of the other identical trust would be subject to all of the risks of being lost through investment or conduct of business enterprises that it is in the hands of petitioner. It would, indeed, be strange if contributions of income to another identical trust were deductible but the same income retained in petitioner's hands was not deductible. In such a case, two identical trusts could be created and each give its income to the other and each thereby secure a deduction for its entire income, but neither could secure any deduction if it retained its own income. The decision below, in effect, reaches this odd result by allowing deduction of contributions to petitioner but disallowing deduction of petitioner's income retained by it.

Congress carefully avoided this result by the provision of §162(a) that a trust may deduct any part of its income which, pursuant to the terms of the will or deed creating the trust, is permanently set aside for the purposes and in the manner specified in the section allowing deduction to individuals for contributions to charity. One of the obvious purposes of this provision is to permit a trust to take a deduction for its retained income where contributions by individuals to the trust to be retained by the trust under the same provisions would entitle the individuals to a deduction.

The fact that the income of a trust is held as a part of the corpus and reinvested, and the fact that no action is taken by the trustees during the taxable year to pay the income to any particular charitable beneficiary, have been held, by rulings of the Bureau of Internal Revenue from the beginning, not to prevent a deduction under the first clause of §162(a) where the deed of trust or the will required all of the assets eventually to go to charitable organizations.

G.C.M. 423 (V-2 C.B. p. 53) involved a trust created by a will where the will left the residue of the property to the trustee, directing the trustee to hold the property with power of sale, investment and reinvestment at its discretion, and to pay over the net income thereof to a certain hospital. The question presented for ruling was whether income arising from gain on sale of part of the assets constituting the corpus was deductible under §219(b)(1) of the Revenue Act of 1926, a predecessor of I.R.C. §162(a). Since there was no direction in the will as to any time when the corpus itself of the trust was to be turned over to the charity and since gain on the sale of assets constituting the corpus is in itself regarded as corpus, there was no clear showing that the income which represented this gain actually in itself would go to the exempt beneficiary. Nevertheless, the Bureau held that a deduction was proper under §219(b)(1), stating that where the trust involves no intermediate estate and remainder over, and is, as this one was, a perpetual charitable trust, the gain on the sale of the corpus becomes a part of the corpus of the fund to be held in perpetuity subject to the terms and conditions of the instrument creating the trust. The

opinion further held that since all the income from this trust was to go to the hospital, the corpus of the fund was permanently set aside for the charity.

If capital gain constituting part of the corpus of a trust is permanently set aside for charity and deductible under §162(a), even though it is a perpetual trust and there is no provision that this gain itself will ever be paid to a charity, then certainly in the case of the Danz trust where the corpus as well as all the income must, within a time specifically provided for in the trust instrument, be paid to charity, a deduction of the income is proper. G.C.M. 423 is a direct holding by the Bureau that income is permanently set aside for a charity and deductible under the first clause of the statute where it is to be held for the eventual benefit of a charity even though it will be subject to the hazards of investment and reinvestment by the trustees.

G.C.M. 423 has never been revoked or modified by the Bureau and was cited with approval in G.C.M. 10423 (XI-2 C.B. p. 127) where the will put the residue of the estate in trust, the income to be paid to the wife during life, with the remainder over to charitable institutions. The question was whether profit from the sale of securities was allowable as a deduction under §162(a). The court held that this profit became a part of the corpus and thus was not available to the life tenant. Since the gain could not be paid to the life tenant, but would be held until the termination of the trust, at which time it would be paid to the charitable institutions, the Bureau held that it was deductible under §162(a). Again, we point out that this capital gain, becoming part of the corpus, could be invested or put back into any business

carried on by the trust. Still, the Bureau held that it was deductible under §162(a), and any possibility that the fund might be lost by bad investments made no difference.

In S. M. 4644 (V-1 C.B. p. 277) a testamentary trust was created with stock of a real estate corporation, and it was provided that the income was to go to private individuals, and upon their death the corpus was to go to charity. The Solicitor held that capital gains became a part of the corpus and thus were by the trust instrument permanently set aside for charity and deductible under §219(b) of the Revenue Act of 1921, which contained only the first clause of I.R.C. §162(a). For all that appears in the opinion, the life tenants would have many years to live and the corpus undoubtedly would be invested and reinvested during that period.

These rulings represent the uniform administrative construction by the Bureau of Internal Revenue of this section of the statute. Until the present case, the court decisions likewise have uniformly construed the first clause of §162(a) as permitting a deduction in situations like that presented here.

This question first arose in *Bowers v. Slocum*, 20 F. (2d) 350, (C.C.A. 2d). There the will of the decedent had left the residue to various charitable organizations. Income was received by this residuary estate during the year 1919, but was not paid to or credited on the books of the estate to any charitable organization during that year. The Commissioner argued that the estate could take no deduction for this income under §219(b) of the Revenue Act of 1918, which contained only the

first clause of what is now §162(a), because it was neither paid nor credited to any organization during the year. The court held, however, that it was deductible as permanently set aside for the charitable organizations, saying (p. 352):

Section 219(b) does not make the deduction depend upon the action of the executors in crediting the income upon their books, but upon the permanent setting aside of the income by the will itself for corporations of the character in question. The question, therefore, resolves itself into this: Was the income received by the estate during the year 1919 permanently set aside for the residuary legatees by the will itself?

The court also stated (p. 353):

In the case at bar the testatrix took the most effective method of setting aside the income in question for the residuary legatees, because by the will itself she set aside for them everything that was left, and thus we find that the income, when received by the executors, was by the will permanently set aside for the residuary legatees, the corporations in question, and that the income in question for the year 1919 was deductible under the provisions of section 219(b).

At about the same time as this Second Circuit decision, the same taxpayer and the same issue came before the Board of Tax Appeals, involving the year 1921. *Herbert J. Slocum, et al, Executors*, 6 B.T.A. 36. The board said (p. 40):

* * * We think it was the intent and purpose of Congress that income of an estate which, in following out the provision of a will, could be shown to be certainly destined for uses specified in para-

graph (11) of subdivision (a) of section 214 should be allowed as a deduction in computing the net income of the estate, * * *

* * * Subdivision (b) of section 219 does not make the deduction depend upon the crediting or payment but upon the permanent setting aside of the income for charitable, religious, or educational purposes. The will directed that the residuary estate 'wheresoever and whatsoever' be distributed to the exempt institutions. When the executors received the income it became a part of the residuary estate and was permanently set aside for and belonged to the exempt institutions. It was, therefore, a proper deduction by the estate.

Ever since these two decisions involving the *Slocum Estate*, it has been accepted that deductions under what is now the first clause of I.R.C. §162(a) were in no way dependent upon any action by the executors or the trustees, but any income which, by the terms of the will or the trust, must eventually go to charities was deductible. *E. C. Johnson, Executor*, 13 B.T.A. 850; *Hu L. McClung, et al, Executors*, 13 B.T.A. 335; *E. Schier Welch, et al, Trustees*, 9 B.T.A. 1370; *Irving Bank-Columbia Trust Co.*, 8 B.T.A. 833; *Beggs v. U.S.*, 27 Fed. Supp. 599 (Ct. Cls.).

Considering the provisions of the statute, the committee reports, the rulings and the decisions, we submit that it is settled that the first clause of §162(a) permits a deduction for any income of an estate or trust where the will or deed of trust contains irrevocable provisions that the income must eventually go to charitable organizations. No payment or crediting or other action by the trustees during the taxable year is required, nor

is it necessary that the will or deed of trust direct that any particular action be taken during the taxable year. Furthermore, the deduction is not affected by the fact that the income will be invested and will be subject to the possibility of being lost if the investments of the trust are unsuccessful. We submit that the Tax Court erred in denying petitioner a deduction under the first clause of §162(a) in the amount of its net income.

2. Deduction of all of the income of petitioner is proper under the second clause of §162(a)

The deduction taken in the present case by petitioner of all of its net income in each year is not only authorized by the first clause of §162(a), but is also independently authorized by the second clause of that section added in 1924. In fact, the interpretation of the two clauses has been such that they both accomplish the same result in the ordinary case, such as the present case, the second clause accomplishing the additional result of permitting the deduction where the estate or trust itself is to use the money directly for charitable purposes rather than to give it to charitable organizations.

As we have previously mentioned, I.R.C. §162(a) was first adopted as §219(b) of the Revenue Act of 1918 (40 Stat. 1057, 1071), and allowed a trust the deduction of any part of the gross income which, pursuant to the terms of the will or deed creating the trust, was during the taxable year paid to or permanently set aside for charitable organizations. In 1924, this Act was amended by adding a provision that the deduction could likewise be taken as to any income that "is to be used exclusively

for” charitable purposes. Revenue Act of 1924, §219(b) (43 Stat. 253, 275). In adopting this amendment, Congress intended it to permit an independent deduction in addition to that permitted by the language of the first clause of the section, which had been adopted in 1918. S. Rep. No. 398, 68th Cong., 1st Sess., p. 25, states that the 1924 amendment to the section was added, “to permit as an additional deduction that part of the gross income which, pursuant to the terms of the will or deed, is to be used exclusively for the prevention of cruelty to children or animals, since contributions by individuals to organizations for these purposes are deductible under §214(a)(10).” In conference, this language was expanded so that it included the purposes of religious, charitable, educational, etc., which were in accord with the types of organizations set forth in the first clause of this section as adopted in 1918. See the statement of the managers on the part of the House at p. 19, as attached to H. Conf. Report No. 844, 68th Cong., 1st Sess.⁵

The language of the statute itself confirms the statement of the Senate Committee that this amendment was

⁵ The language of the Senate Committee above quoted indicates further the understanding of Congress that a trust receives a deduction in the amount of its income in situations where contributions to the trust are deductible by the contributing individuals under §214(a)(10), the predecessor of I.R.C. §23(o). This Senate Report thus highlights the inconsistency of the Tax Court in this case in granting deduction under §23(o) to the individuals for contributions made to petitioner and at the same time denying petitioner a deduction of its own income, both the contributions received and the income received by petitioner being held under the same provisions of the trust instrument.

intended to permit an independent deduction. The two co-ordinate clauses of §162(a) both commence with the word "is," and the section has full meaning when read with either of these clauses, omitting the other. Thus, if it is desired, the section can be read as follows (taking the language as it existed during the taxable years here in question) :

(a) There shall be allowed as a deduction (in lieu of the deduction for charitable, etc., contributions authorized by §23(o)) any part of the gross income without limitation which pursuant to the terms of the will or deed creating the trust * * * is to be used exclusively for religious, charitable, literary or educational purposes.

The regulations adopted under the 1924 Act show that the administrative construction was to the same effect. Regs. 65, Art. 342, provided :

(1) If the terms of the will or of the deed creating the trust direct that any part of the gross income of the estate or trust (a) be paid or permanently set aside for charitable or other purposes as specified in §214(a)(10), or (b) be used exclusively for religious, charitable, scientific, literary or educational purposes * * * such gross income so paid or set aside during the taxable year shall be allowed as a deduction in lieu of the deduction authorized by §214(a)(10).

The language of the regulations under the 1924 Act was used in all the regulations until the 1934 Act. At that time, it was changed to read as follows (Regs. 86, Art. 162-1) :

(1) Any part of the gross income of the estate or trust for its taxable year which, by the terms of the will or of the instrument creating the trust, is

paid or permanently set aside during such year for the charitable, etc., uses or purposes referred to or described in subsection (a) of section 162.

This change in regulations was undoubtedly, as we will point out, caused by the fact that the interpretation of the section had been such that a deduction under that section would ordinarily qualify under both clauses of the section, and it apparently was not deemed necessary to continue to state the two clauses in the alternative. Notice should be taken of the fact that while the second clause of §162(a) does not include the phrase, "during the taxable year," the 1934 regulations appear to apply this phrase to both clauses. No difficulties flowed from this consolidation because it was generally understood that where income was being accumulated, rather than paid out, the existence of trust provisions requiring a charitable use of the funds was all that was required by the phrase concerning the taxable year.

The language of the 1934 regulations has continued throughout the years involved in this case. See Regs. 111, §29.162-1.

While the second clause of §162(a) was undoubtedly primarily intended by Congress to reach situations where the trust retains its income for eventual direct application by the trust itself to exempt purposes, nevertheless, both the administrative and the judicial construction has been that this clause likewise authorizes a deduction where the income is held for payment to other organizations that will apply it to exempt purposes. In S. M. 4613 (V-1 C.B. p. 71), the trustees were to hold the property and invest it until it had increased to X dollars, and then turn the entire corpus over to a

corporation created for the purpose of making charitable loans. The question was raised by the Income Tax Unit as to whether the trust could take a deduction for income in years prior to the organization of the corporation that was to eventually receive the money. The Solicitor of Internal Revenue in his ruling held that a deduction was permissible, pointing to the addition to the section in the Revenue Act of 1924.

It will be seen from this ruling that the administrative construction of the second clause of §162(a) was the same as the construction of the first clause, namely, that it authorized the deduction of any income which, under the terms of the trust deed, was held in trust irrevocably for a charitable organization. The second clause also covered the additional situation where the money was held for eventual use by the estate or trust itself for charitable purposes. In this identity of the construction of the two clauses can be seen the reason why the alternative statement of the two clauses that was contained in the regulations prior to 1934 was consolidated into one statement in the 1934 regulations, as previously set forth.

The meaning of the second clause of §162(a) was considered at length in the leading case of *Estate of J. B. Whitehead*, 3 T.C. 40, Affd. *sub nom. Commissioner v. Citizens and Southern National Bank*, 147 F.(2d) 977 (C.C.A. 5th). In the *Whitehead* case, the testator left a will providing that a corporation should be formed to take his residuary estate and, after paying certain special bequests to various individuals, pay the balance to charity. The question involved in the case was whether the estate was entitled to take a deduction

under §162(a) for that part of its income which was held for payment to the corporation. The will provided that the corporation would be managed by trustees or directors and that one-fourth of the income should be used by them by disbursing it to the most deserving orphans' home or homes, and the balance should be used for charitable purposes, either directly or given to charitable institutions. The estate borrowed substantial amounts of money, in the neighborhood of \$1,000,000.00, for purposes of paying off obligations of the estate, and a good part of the income of the estate was used to make payments on these loans. Although the decedent passed away on November 14, 1935, no distributions were made to the charitable corporation until 1938. The estate claimed a deduction in 1936 for \$431,449.53 as income accrued in favor of the charitable corporation. This was the entire income of the estate, less the amount going to the private beneficiary.

The Tax Court held that the test of the propriety of the deduction claimed was furnished by the terms of the will and not by what was actually done thereunder, and referred to the second clause of §162(a), as added by the Revenue Act of 1924, stating that this language provided an additional deduction, and further stating (p. 49):

Apparently, and it seems to us with good logic, it was considered that the trust involved in the requirement of exclusively charitable, etc., use would guarantee application to such uses equally as safely as requiring an organization formed and operated exclusively for such uses. If, therefore, in this case the will provided that any part of the gross income of his estate was to be used exclusively for

charitable or educational uses, as to such part the foundation, the agency for such use, provided by the will need not comply with the requirements of the earlier part of §162(a), that is there need be no payment to, or permanent setting aside to, an entity organized and operated exclusively for charitable or educational purposes with no benefit inuring to private individuals, as required by the section prior to 1924.

The Tax Court then referred to §403(a)(3) of the Revenue Act of 1921, allowing a deduction for estate tax purposes of bequests to or for the use of a charitable corporation or to a trustee exclusively for charitable purposes, and referred to *Eagan v. Commissioner*, 43 F.(2d) 881 (C.C.A. 5th), stating (p. 50):

* * * There is in our opinion no essential difference, so far as here concerned, between the latter part of section 403 construed as above by the court, and the latter part of section 162(a). In the case of each, provision for deduction merely because of exclusively charitable, etc., use of legacies was added to the earlier clause requiring that the recipient be an organization organized and operated exclusively for such charitable, etc., purposes. That the intent was to broaden the deductions beyond those merely to organizations particularly organized and operated is patent. A trust was imposed in the instant case upon the funds to be 'exclusively used' for charity, education, etc. They were received in trust for such use. The respondent, upon reply brief, takes the view that the foundation received the remainder in trust. We conclude and hold that within the 'to be used exclusively' clause in section 162(a) the foundation receiving and disbursing the estate was not required to qualify

under the earlier language, as one organized and operated exclusively for charitable purposes, etc., but that the statutory provision covers the situation if the charitable, etc., use of the estate as directed by the will was to be exclusive. The use required by the will, not the character of the disbursing agency, is sufficient test, under the latter part of section 162(a).

The Commissioner also resisted the deduction on the ground that the will did not direct the income to be used for charity during the period of administration. On this point, the Tax Court stated (p. 54):

It is also contended that the deductions claimed are improper for the reason that the will does not direct the income to be used for charity during the period of administration, covering the taxable years, but that only the foundation could, under the will, spend the income upon charity. In *Potter v. Bowers, supra*, the court followed *Bowers v. Slocum, supra*, and held that it was not essential that the charitable institution be in existence during the taxable year, it being sufficient if the will mandatorily required its incorporation, and that the income ultimately distributed was deductible even though it had been reduced by an amount paid to settle a suit contesting the will. Here the will directed the organization of the foundation as soon as possible after the testator's death. Petitioner had no discretion in the matter and was bound by the direction set forth in the will.

The decision of the Tax Court in the *Whitehead* case was affirmed by the Circuit Court of Appeals for the Fifth Circuit in *Commissioner v. Citizens and Southern National Bank*, 147 F.(2d) 977. The Commissioner par-

ticularly argued that the amounts of income which had been paid to discharge debts and obligations of the estate were not deductible under §162(a) because they had not been paid or permanently set aside during the taxable year exclusively for charitable purposes. The Circuit Court of Appeals states (p. 980) :

* * * As to the claim that the use of the income by the executor to defray corpus charges has subjected the charity to taxes on income which the statute expressly exempts from tax, taxpayer, citing cases the Tax Court cites, urges that it is the terms of the will and not what the executor does with the income which determines the exemption, * * *. He argues further that in fact and in law the funds were paid or permanently set over to charitable uses in that, by mere temporary transfer from the income account to the corpus account, they discharged claims against the corpus and saved property itself devised to charity.

The Court of Appeals then states that it agrees with the taxpayer and approves the Tax Court opinion, and says (pp. 980-981) :

* * * Neither are we in any doubt that in creating the foundation and in protecting the corpus against the unforeseen contingencies which arose after death, the executor, by defraying corpus charges out of income, has not deprived the charity of the exemption the will and statute conferred whether the view is taken that the use of the income to pay corpus charges was a charitable use or the view that it was not, but, being unauthorized by the will, it was a diversionary act of the executor without effect. * * * Neither does the fact that part of the income was temporarily diverted to defray corpus charges affect the dedication to charity pro-

vided by the will, or subject the exempt income to tax.

The synthesis in the construction of the two clauses of §162(a) is shown by the case of *Lydia Hopkins*, 13 T.C. 952, where a deduction under §162(a) was sustained on the basis that the trust instrument itself permanently set aside the income for a charitable organization and relying on *Bowers v. Slocum*, 20 F.(2d) 350 (which involved only the first clause of §162(a)), but also citing, in support of the conclusion reached, the *Citizens and Southern National Bank (Whitehead)* case which involved the second clause of §162(a). The particular questions we are dealing with here were considered in the *Lydia Hopkins* case under Issue B, Docket No. 12818, beginning at p. 973 of the opinion. The issue was whether a capital gain realized by the trust was permanently set aside for a conceded charitable institution. The principal question was the effect of two private annuities, and the court held that these did not prevent a deduction. The Commissioner then argued that the trustees had not sufficiently acted to set aside the gain, but the court, citing the *Whitehead* case, held that the trustor herself had set the fund aside by the terms of the trust instrument. With regard to the management, investment and use of the income, it is interesting to note that in the *Lydia Hopkins* case the trustee had the power to sell any or all of the corpus, to credit the proceeds to corpus, and to reinvest the proceeds in such property, real or personal, as it might deem fit, without being restricted to investments prescribed or authorized by law as trustee investments. The trustee was also given broad powers of management and

control of the trust property. Among the assets of the trust were several pieces of real estate which the trustees managed, most of which were sold in the years immediately following the taxable years involved. In holding that the income was, by the terms of the trust instrument, permanently set aside for charity, the court in no way discussed the use of the income in the making of investments as bearing on such question. Furthermore, the court held that the possibility under the trust that loans might be made to the grantor did not prevent the deduction. While there were several dissents in the *Lydia Hopkins* case, these dissents all went to Issue A in the proceedings, and apparently there was unanimous agreement in the Tax Court on the disposition of Issue B. The Government's appeal from the *Lydia Hopkins* decision was dismissed by stipulation.

The opinion below cites two cases, *Commissioner v. F. G. Bonfils Trust*, 115 F.(2d) 788, and *Commissioner v. Upjohn's Estate*, 124 F.(2d) 73, which hold that the deduction depends upon consideration of the terms of the deed of trust and which consider the effect of the possibility that the income may be used for the payment of private bequests. These cases support our position and the Tax Court, even though citing them, gave no effect to the rule they and the other cases cited by us lay down, which is that the deduction is allowable where the trust deed requires the entire fund eventually to be used for exempt purposes.

The only other case cited in the opinion of the Tax Court is *Old Colony Trust Co. v. Commissioner*, 301 U.S. 379. However, the *Old Colony Trust* case does not support the opinion below. That case involved the de-

ductibility of payments actually made to charitable organizations during the taxable year by a trust where the trust deed did not require the money to go to charitable organizations, but at the discretion of the trustees could have been paid to private individuals. The court held that it was not necessary to a deduction under §162(a) that the deed definitely direct the charitable contributions which are claimed as deductions and that, where the trustees had discretion as to payment to exempt or non-exempt beneficiaries, the trust was entitled to a deduction for the amount actually paid to exempt beneficiaries. This holding in no way affects the settled law that where the trust instrument requires all corpus and income to go to exempt organizations, a deduction of the entire net income is authorized by §162(a).

This court has recently considered §162(a) in *Estate of Huesman v. Commissioner*, 198 F.(2d) 133 (C.A.9th). Deduction was there claimed of income because the estate saw fit to use this income to satisfy a charitable bequest of a percentage of the residue of the estate. The deduction was denied because the will gave no right to the charity to have its bequest payable out of income. This decision has no bearing on the present case where the trust deed directs all corpus and income to be paid to exempt organizations. Nevertheless, the following statement from the opinion shows this court's awareness of the rule that the test of deduction is to be found in the directions of the will or trust deed (198 F.(2d) at p. 136):

This negatives the idea that the payment was ' * * * pursuant to the terms of the will * * * ' under §162(a).

3. Changes made in 1950 act confirm construction of previous law as granting deduction to petitioner

That the construction of §162(a) in the administrative rulings and cases above cited was fully understood as being the law at the time the changes were made in the taxation of exempt organizations in the 1950 Revenue Act is shown by a study of the provisions of that act. Section 321 of the Revenue Act of 1950 (64 Stat. 906, 954) amended I.R.C. §162(a) by providing that the deduction therein granted would be subject to the provisions of a new subsection (g), which was added to §162. Section 162(g) as added by Revenue Act of 1950, §321, provides: (1) that a trust may not take a deduction after December 31, 1950, under §162(a) for Supplement U Business Income which is made the subject of a special tax on exempt organizations after that time; (2) that where the trust has engaged in prohibited transactions with the grantors or others it will be limited to a deduction of 15% of its net income for taxable years subsequent to notification by the Secretary of the Treasury; and (3) it will be limited to a deduction of 15% of the net income where the income permanently set aside and not paid out during the taxable year is unreasonable in amount or duration in order to carry out the purposes of the trust or is used to a substantial degree for other than charitable purposes or is invested in a manner such as to jeopardize the interest of the beneficiaries.

This language indicates a recognition that in years prior to 1950 a deduction could be taken under §162(a) even if the income came from operation of a business and was not paid out during the taxable year but in-

stead was used for further investment. The 1950 Act limits such deductions only for future years.

H. Rep. No. 2319, 81st Cong., 2d Sess., (part III G), which accompanied the Revenue Act of 1950 as reported to the House, stated with regard to the effect of §162(a) as it stood prior to the 1950 Act:

Thus, a trust which either distributes or accumulates its income for charitable purposes is, for all practical purposes, exempt from income taxes.

Here is a definite statement by the Ways and Means Committee that it understood that under §162(a) prior to the 1950 Act, a trust was entitled to a deduction if the income was put back into corpus and accumulated for future payment to charitable organizations.

We submit that consideration of the Revenue Act of 1950 and the committee report thereon confirms the fact that petitioner is entitled to a deduction under §162(a) for all of the net income of the trust in the years here involved.

III.

RETURNS ON FORM 990 WERE SUFFICIENT TO START RUNNING OF STATUTE OF LIMITATIONS SO THAT ASSESSMENTS FOR 1943, 1944 AND 1945 ARE BARRED

In the event it were held that petitioner is not exempt from taxation and not entitled to a deduction of all of its net income, we submit that the assessment of deficiencies for the years 1943, 1944 and 1945 is barred by the provisions of I.R.C. §275(a) requiring that income taxes be assessed within three years after the return was filed.

Petitioner filed returns on Form 990 for the calendar years 1943, 1944 and 1945 with the Collector of Internal Revenue on September 19, 1946. (R. 83; Joint Exs. 2B, 3C and 4D.) The deficiency letter for these years was mailed to petitioner on October 14, 1949, more than three years later. The question is thus raised as to whether a return by a trust on Form 990 is sufficient to start the running of the statute of limitations.

Petitioner filed the returns on Form 990 pursuant to the provisions of I.R.C. §54(f) (Appendix, *infra*, pp. 67-70). As it read in the years here involved, §54(f) required an exempt trust to "file an annual return which shall contain or be verified by a written declaration that it is made under the penalties of perjury stating specifically the items of gross income, receipts and disbursements and such other information for the purpose of carrying out the provisions of this chapter as the Commissioner, with the approval of the secretary, may by regulations prescribe, * * *." Revenue Act of 1943 (58 Stat. 21, 36) §117(a).⁶

Section 54(f) required a return by every organization exempt from taxation under §101 with certain exceptions, the exceptions not covering petitioner. Section 54(f) is a part of Part V of subchapter B of c. I of the Internal Revenue Code. Chapter I of the Code imposes the income tax. Part V of subchapter B is that portion of c. I which, together with Supplement D (which is expressly supplementary to Part V), provides for the returns to be made by all taxpayers under c. I. I.R.C.

⁶ Revenue Act of 1943, §117(b) made this amendment applicable to tax years beginning after December 31, 1942.

§142, a part of Supplement D and thus a part of Part V, provided during the taxable years that fiduciaries, including trusts, "shall make under oath a return * * * stating specifically the items of gross income thereof and the deductions and credits allowed under this chapter and such other information for the purpose of carrying out the provisions of this chapter as the Commissioner with the approval of the Secretary may by regulations prescribe." I.R.C. 1939 Ed. (53 Stat. 1) §142 as amended by Revenue Act 1940 (54 Stat. 516) §7b; Revenue Act of 1941 (55 Stat. 687) §112b; and Revenue Act of 1942 (56 Stat. 798) §131(c) (2).

The information called for in returns under I.R.C. §142 was substantially the same as under I.R.C. §54(f). Thus we have two sections in the same part of the Internal Revenue Code (the part dealing with returns and payment of income tax) requiring returns containing substantially the same information, one section applying to taxable trusts and the other to exempt trusts.

In view of the location of these two sections under Part V (or Supplement D which is supplementary thereto) dealing with returns and payment of income tax and in view of the substantial identity of their requirements, it would indeed be strange if a return under one of these sections were said to be referred to by the words, "the return," as used in I.R.C. §275(a) and a return under the other section be not referred to by those words. In the years here involved, I.R.C. §275(a) read as follows:

Sec. 275. Period of limitation upon assessment and collection. Except as provided in section 276—
(a) General Rule.—The amount of income taxes

imposed by this chapter shall be assessed within three years after the return was filed, and no proceeding in court without assessment for the collection of such taxes shall be begun after the expiration of such period. I.R.C. 1939 Ed. (53 Stat. 1) §275(a).

It is true that the Commissioner prescribed different forms for the returns under these two sections, Form 1041 being required under I.R.C. §142, and Form 990 under I.R.C. §54(f). Nevertheless, the meaning of the words, "the return," as used in I.R.C. §275(a) must be found in the language and structure of the law itself rather than in the acts or requirements of the Commissioner thereunder. Moreover, where the information called for and furnished is substantially the same in both returns, as it is here, the fact that the Commissioner asks for it in a different form or arrangement should not affect the substantive identity of the two returns.

At the time these returns were filed by petitioner on Form 990 on September 19, 1946, there had been no ruling by the Commissioner as to whether or not petitioner was exempt. Compliance with the Internal Revenue Code in the matter of filing returns on behalf of this trust required the trustees to make their own determination as to whether or not the trust was exempt. The trustees in this case believed and still believe that petitioner was and is exempt and, consequently, interpreted Part V of the Internal Revenue Code as requiring that petitioner should file returns under §54(f). Even if the courts were eventually to hold in this case that petitioner is not exempt, there would be no doubt that the

trustees acted in good faith and on reasonable grounds in filing returns under §54(f) rather than under §142. In such circumstances, there is no reason in law or equity why a trust should be deprived of the protection of the statute of limitations.

While we are unable to find any decision involving these two particular types of returns, we believe that the case of *Germantown Trust Co. v. Commissioner*, 309 U.S. 304, 84 L.Ed. 770, is determinative of this matter. In the *Germantown Trust* case, an ordinary trust filed a fiduciary return on Form 1041. The Commissioner later contended that the trust was an association taxable as a corporation. The Commissioner contended that a Form 1041 fiduciary return did not start the running of the statute of limitations on a tax under the corporation provisions of the income tax law. The Supreme Court held that it did, stating that the return on Form 1041 contained all of the data from which a tax could be computed and assessed, although it did not purport to state any amount due as tax. The court pointed out that the fiduciary return was a return of the tax in respect of which the liability arises, namely, the income tax. The court further held that where a fiduciary in good faith made what it deemed the appropriate return which disclosed all of the data from which the tax, treated as one imposed upon an association, could be computed, such a return cannot be deemed to be no return so as to leave the fiduciary unprotected by the statute of limitations.

In the present case, the situation is similar. The fiduciary in good faith made what it deemed to be the ap-

propriate returns. These returns showed in detail all the income and disbursements of petitioner. (Joint Exs. 2B, 3C and 4D.) Thus as in the *Germantown* case, they disclosed all the data from which the tax could be computed if the Commissioner felt that petitioner was taxable rather than exempt. Furthermore, as in the *Germantown* case, the return was filed as a return of the tax in respect of which the liability arises since it was a return required by that part of the Internal Revenue Code providing for the returns which are to be made for income tax purposes. Consequently, the *German-town Trust* decision is directly applicable.

Decisions such as *Commissioner v. Lane-Wells Co.*, 321 U.S. 219, 88 L.Ed. 684, where the court held that a return filed under the provisions of the income tax law did not start the running of the statute of limitations against the personal holding company tax, are distinguishable because the returns which were filed were not under the Code provisions dealing with the same tax.

The returns on Form 990 here involved were regarded by the Bureau of Internal Revenue as being income tax returns, as is shown by Reg. 111, §29.54-1 (26 C.F.R. 1st Ed. 29.54-1, p. 331) as amended by T.D. 5381, June 26, 1944 (C.B. 1944 p. 188).

The fact that upon request from the Commissioner, petitioner later filed returns on Form 1041 does not destroy the effect of the returns previously filed on Form 990. I.R.C. §54(b) gives the Commissioner the power to require any person to make any return which the Commissioner desires. Certainly by the exercise of this power the Commissioner cannot relieve himself of

the duty to act in the statutory period after a taxpayer has filed a return addressed to the particular tax involved and containing the information from which an assessment of the tax could be made.

Subsequent to the decision of this case by the Tax Court, petitioner's counsel was advised by other attorneys that there had been in effect for some years an unpublished ruling of the Bureau of Internal Revenue holding that returns on Form 990 were sufficient to commence the running of the statute of limitations. Upon inquiry by petitioner's counsel of officials of the Bureau, the existence of such a ruling was confirmed and it was likewise confirmed that the ruling had been followed in disposing of other cases and had not been revoked. Nevertheless, the Bureau refused to supply a copy of the ruling and refused to permit petitioner's counsel to read the ruling.

In this connection, we refer the court to Miscellaneous Report No. 106 of the Farm Credit Administration, United States Department of Agriculture, dated April, 1947, and bearing the title "Preparing Federal Annual Returns for Tax-Exempt Farmers' Cooperatives." This is an official Government publication which was circulated among farmers' cooperatives. It states as follows (p. 4):

In the case of taxable businesses, the Federal limitations statute bars the Government from making an assessment of taxes after expiration of 3 years from the date of filing an income tax return, except where the latter is fraudulently made.

While an official ruling has not yet been published by the Bureau of Internal Revenue, it is un-

derstood informally that the 3-year period of limitations is started in the case of tax-exempt organizations upon their filing of form 990 provided, of course, that the return is *full and complete*.

CONCLUSION

The Tax Court should be reversed in both cases and as to all years it should be determined that there are no deficiencies, first, because petitioner was exempt under I.R.C. §101(6) and, second, because even if not exempt, petitioner was entitled to a deduction of all of its net income under I.R.C. 162(a). In any event, the decision in Tax Court Cause No. 26404 should be reversed because assessment of deficiencies for the years 1943, 1944 and 1945 was barred by I.R.C. 275(a).

Respectfully submitted,

F. A. LESOURD,

LITTLE, LESOURD, PALMER & SCOTT,

1510 Hoge Building,

Seattle 4, Washington

Attorneys for Petitioner

Dated: March 31, 1953.

APPENDIX

STATUTES INVOLVED

Internal Revenue Code §23(o) as amended by Revenue Act of 1939 (53 Stat. 1) §224:

Sec. 23(o) Charitable and other contributions.—
In the case of an individual, contributions or gifts payment of which is made within the taxable year to or for the use of:

* * *

(2) A corporation, trust, or community chest, fund, or foundation, created or organized in the United States or in any possession thereof or under the law of the United States or of any State or Territory or of any possession of the United States, organized and operated exclusively for religious, charitable, scientific, literary, or educational purposes, or for the prevention of cruelty to children or animals, no part of the net earnings of which inures to the benefit of any private shareholder or individual and no substantial part of the activities of which is carrying on propaganda, or otherwise attempting, to influence legislation;

* * *

Internal Revenue Code §54(f), as added by Revenue Act of 1943, §117(a):

Sec. 54(f) Every organization, except as hereinafter provided, exempt from taxation under section 101 shall file an annual return, which shall contain or be verified by a written declaration that it is made under the penalties of perjury, stating specifically the items of gross income, receipts, and disbursements, and such other information for the purpose of carrying out the provisions of this chapter as the Commissioner, with the approval of

the Secretary, may by regulations prescribe, and shall keep such records, render under oath such statements, make such other returns, and comply with such rules and regulations as the Commissioner, with the approval of the Secretary, may from time to time prescribe. No such annual return need be filed under this subsection by any organization exempt from taxation under the provisions of section 101—

(1) which is a religious organization exempt under section 101(6); or

(2) which is an educational organization exempt under section 101(6), if such organization normally maintains a regular faculty and curriculum and normally has a regularly organized body of pupils or students in attendance at the place where its educational activities are regularly carried on; or

(3) which is a charitable organization, or an organization for the prevention of cruelty to children or animals, exempt under section 101(6), if such organization is supported, in whole or in part, by funds contributed by the United States or any State or political subdivision thereof, or is primarily supported by contributions of the general public; or

(4) which is an organization exempt under section 101(6), if such organization is operated, supervised, or controlled by or in connection with a religious organization described in paragraph (1); or

(5) which is an organization exempt solely under section 101(3); or

(6) which is an organization exempt under section 101(15) if such organization is a corporation wholly owned by the United States or any agency

or instrumentality thereof, or a wholly owned subsidiary of such a corporation.

Internal Revenue Code (1939 Ed.) (53 Stat. 1)
§101:

Sec. 101. Exemptions from tax on corporations.

The following organizations shall be exempt from taxation under this chapter—

(6) Corporations, and any community chest, fund, or foundation, organized and operated exclusively for religious, charitable, scientific, literary, or educational purposes, or for the prevention of cruelty to children or animals, no part of the net earnings of which inures to the benefit of any private shareholder or individual, and no substantial part of the activities of which is carrying on propaganda, or otherwise attempting, to influence legislation;

* * *

Internal Revenue Code (1939 Ed.) (53 Stat. 1)
§162:

Sec. 162. Net income.

The net income of the estate or trust shall be computed in the same manner and on the same basis as in the case of an individual, except that—

(a) There shall be allowed as a deduction (in lieu of the deduction for charitable, etc., contributions authorized by section 23(o)) any part of the gross income, without limitation, which pursuant to the terms of the will or deed creating the trust, is during the taxable year paid or permanently set aside for the purposes and in the manner specified in section 23(o), or is to be used exclusively for religious, charitable, scientific, literary, or educa-

tional purposes, or for the prevention of cruelty to children or animals, or for the establishment, acquisition, maintenance or operation of a public cemetery not operated for profit;

* * *

Internal Revenue Code (1939 Ed.) (53 Stat. 1)
§275(a):

Sec. 275. Period of limitation upon assessment and collection. Except as provided in section 276—

(a) *General rule.*—The amount of income taxes imposed by this chapter shall be assessed within three years after the return was filed, and no proceeding in court without assessment for the collection of such taxes shall be begun after the expiration of such period.

Days
No. 13608

**In the United States Court of Appeals
for the Ninth Circuit**

THE JOHN DANZ CHARITABLE TRUST, PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

**ON PETITIONS FOR REVIEW OF THE DECISIONS OF THE TAX
COURT OF THE UNITED STATES**

BRIEF FOR THE RESPONDENT

H. BRIAN HOLLAND,
Assistant Attorney General.

ELLIS N. SLACK,
MELVA M. GRANBY,
Special Assistants to the Attorney General.

FILED

MAY 9 1962

PAUL P. HARRISON

Clerk

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COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

*ON PETITIONS FOR REVIEW OF THE DECISIONS OF THE TAX
COURT OF THE UNITED STATES*

BRIEF FOR THE RESPONDENT

OPINION BELOW

The findings of fact and opinion of the Tax Court (R. 106-129) are reported at 18 T.C. 454.

JURISDICTION

The Commissioner determined deficiencies in income tax, declared value excess profits tax, and excess profits taxes against taxpayer for the years 1943 to 1947, inclusive, and added a penalty addition for the year 1947. (R. 108.) Notice of the deficiencies for the years 1943, 1944 and 1945 was mailed to taxpayer on October 14, 1949 (R. 10-23), and for the years 1946 to 1947 on

March 5, 1951 (R. 54-60). Petition for review by the Tax Court as to the 1943, 1944 and 1945 deficiencies (R. 3-40) was filed on January 9, 1950 (R. 40). Petition for review by the Tax Court as to the 1946 and 1947 deficiencies (R. 47-78) was filed April 9, 1951 (R. 78). Accordingly, both petitions were filed within the 90-day period allowed by Section 272 of the Internal Revenue Code. The petition covering the years 1943, 1944 and 1945 was subsequently amended (R. 44-45) and the Commissioner filed an answer to it both before and after amendment (R. 40-43, 46-47). The Commissioner filed an answer to the petition covering the years 1946 and 1947 (R. 78-81) and both cases were consolidated in the Tax Court with other cases involving individual taxpayers (R. 106). After hearing in the consolidated cases, the Tax Court entered decision in each of the instant cases on August 19, 1952, determining deficiencies in income tax in the total amount of \$165,667.47 and a penalty of \$797.47 for 1947. (R. 130-131.) A petition for review by this Court in each case was filed on September 11, 1952 (R. 131-133, 134-135), and the two cases were subsequently consolidated for hearing and decision in this Court (R. 145). The Court accordingly has jurisdiction of the cases under Section 1141 (a) of the Internal Revenue Code, as amended by Section 36 of the Act of June 25, 1948.

QUESTIONS PRESENTED

1. Whether the trust, which was authorized to and did conduct businesses for profit, was "organized and operated exclusively for * * * charitable * * * purposes", and is thus exempt from tax under Section 101 (6) of the Internal Revenue Code, simply because the trust fund is payable only to such exempt organizations

as John Danz, one of the grantors, shall designate from time to time during his lifetime and, upon his death, by his will.

2. Whether the trust net income of the taxable years not actually paid to charitable organizations during the taxable years was, pursuant to the trust instrument, "permanently set aside" for charitable purposes during the taxable years, and is thus deductible under Section 162 (a) of the Code, even though the income was subject to use by the trustees for speculative investments and for the purchase and operation of trades and businesses, and charitable organizations could receive only such trust funds as John Danz designated during his lifetime (for which deduction has been allowed) and which remained at his death.

3. Whether the filing by taxpayer of Form 990 returns required of exempt organizations under Section 54 (f) of the Code started the running of the three-year limitation period prescribed by Section 275 (a) for assessment of taxes so as to bar collection of the income tax deficiencies for 1943, 1944 and 1945.

STATUTES AND REGULATIONS INVOLVED

The pertinent statutes and Treasury Regulations are set forth in the Appendix, *infra*.

STATEMENT

The facts found by the Tax Court pertinent to the issues on appeal are as follows:¹

On December 31, 1942, John Danz and his wife Jessie created "The John Danz Charitable Trust" (see R. 23-25) to which they transferred 900 shares of Sterling

¹ All facts stipulated by the parties (R. 81-105) were incorporated by reference in the Tax Court's findings (R. 118).

Theatres, Inc., common stock. The trustees named were John Danz and the grantors' two sons, William and Frederic Danz. (R. 109-110.)

John Danz, who had been in the business of operating motion picture theatres in Seattle for about 40 years, concluded during the latter part of World War II that different ideologies were causing a great deal of trouble and even had a tendency to create wars; that the country was about ready for some philosophy with some common ground acceptable to everyone based upon science, pragmatism, experience and research that would eliminate all differences of opinion; but that to get such an organization started in a large number of communities would require money. It was for making and supplying money for such a purpose that "The John Danz Charitable Trust" was created. John hoped to find some organization in the United States with a number of branches which could be helped with the trust funds to grow and educate the people. He did not know of any such organization at the time he created the trust and for that reason reserved in the trust the right to designate the charitable beneficiaries of the trust. (R. 109-110.)

The trustees were given broad powers over the trust property, including the power to engage in business under various forms, to loan funds of the trust with or without security, to join in enterprises in which the trustees were personally interested provided they exercised good faith in the interests of the trust estate, and, in investing or speculating, to combine funds of any trusts created by the grantors. The trustees were entitled to receive reasonable compensation for their services but received none during the taxable years.

They were not to be personally liable, in the absence of bad faith, for any losses from proper use of the trust funds. The grantors were not to derive and they have not derived, directly or indirectly, any benefit from the trust property. The trust was irrevocable but could be amended in certain respects by the joint action of William Danz, Fred Danz and Leslie Stusser (the latter of whom was not related to or employed by any of the Danzes). The power to amend did not include the power to change the beneficiaries or to make a change which would in any way benefit the grantors or their estates. Additional property could be added to the trust. Leslie Stusser was to take the place of John Danz as trustee if occasion arose. Any other vacancy was to be filled by appointment made by the remaining trustees. The trustees were to act through a majority. The trust instrument was to be governed by the laws of Washington. (R. 110-112.)

Under the trust instrument John Danz was to have the right during his lifetime and by his will to designate the beneficiary or beneficiaries of the trust and to change, add, or withdraw beneficiaries which were to receive corpus or income of the trust at times and in amounts specified by him. Designations were to be in writing delivered to the trustees. Only a corporation or organization "of a type which is within the exemption from Federal Income Tax now granted by Paragraph 101 of the Internal Revenue Code and in the event such exemption is hereafter restricted, then also within such restrictions" could be designated and the beneficiary also had to be of the type then specified in Sections 23 (o), 812 (d), and 1004 (a) (2) of the Internal Revenue Code so that the contribution, bequest or gift to

such beneficiary would be deductible from income and exempt from estate and gift tax and in the event those classes were further restricted, then the beneficiary had to be within such restrictions. Named adult grandchildren or the trustees were to make similar designations covering any amount remaining in the trust after John's death and not covered by his will. (R. 111.)

No amendments were made in the trust during the taxable years.² John, William and Frederic Danz served as trustees of the trust from its inception throughout the taxable years.³ Books and records were kept for the trust. Title to all of the assets of the trust has been taken in the name of the trustees. Bank accounts were maintained for the trust. (R. 112.)

During the taxable years additional contributions to the trust were made in cash, in stock of Sterling Theatres, Inc., and in stock of Sterling Theatres Company, Inc., by the grantors, and by William Danz and his wife and Frederic Danz and his wife. The total contributions during the taxable years amounted to \$109,542. (R. 112).

John Danz, after the creation of the trust, continued, at his own expense, to search for the type of organization which he had in mind in forming the trust, and after several years of travel and search he decided that there were groups of Humanists which came close to what he had in mind. He was instrumental with others in starting such an organization in Seattle beginning in the early part of 1947. It was incorporated as the Humanist Society of Washington. Prior thereto and

² Amendments were, however, made in 1948 and 1949. (R. 87-88.)

³ In 1949, after the taxable years, the Seattle Trust and Savings Bank was added as a trustee. (R. 88.)

beginning in September of 1946, he had designated "American Humanist Society", an organization which had a number of affiliates in different parts of the United States, as a beneficiary to receive funds of the trust in the total amount of \$11,500. He was also instrumental, along with others, in starting the Humanist Society of San Francisco and, after the taxable years, in starting the Humanist Society of Los Angeles. The first distribution from the trust to the Humanist Society of Washington was made on March 20, 1947. Thereafter during that year additional large distributions were made to the Humanist Society of San Francisco and to other charitable organizations. (R. 113.)

The trust purchased 600 shares of stock of Midland Steel Products for \$17,691.64 in 1943 and sold those shares for a profit of \$4,583.62 in 1945. It bought and retained 500 shares of Anaconda Copper in 1945 and 1,500 shares in 1946, and, in 1946, 1,000 shares each of Boeing Airplane Company, National Gypsum, and Westinghouse Electric at a total cost of \$161,154.25. It also held on December 31, 1947, donated shares of Sterling Theatres, Inc., and Sterling Theatres Company, Inc., which it carried at \$56,992. (R. 113-114.)

The trust made the following purchases (R. 114):

	Cost	Year
Savoy Hotel Property, including furnishings and fixtures	\$166,440.76	1943
Improved real estate Seventh and Pike....	95,544.23	1943
Improved real estate Eighth and Pike.....	42,866.11	1943
Improved real estate Sixth and University	75,104.70	1946
Improved real estate San Francisco.....	42,882.35	1947

That trust held the properties during the remaining taxable years and received rents therefrom, except that it sold the property at Eighth and Pike in 1946 at a

profit of \$43,740.78. The Savoy Hotel property and the Seventh and Pike properties substantially increased in value during the taxable years. There was a mortgage on the Savoy Hotel building in the amount of about \$68,000 at the end of 1943. It was reduced \$21,676 during 1944, but by the end of 1945 it had been increased to about \$91,000. Thereafter, it was gradually reduced until it amounted to \$45,739.74 at the end of 1947. There was a mortgage on the Seventh and Pike property which amounted to \$44,860.04 at the end of 1943. It had been reduced to \$19,689.04 by the end of 1945 and was paid off in 1946. There was a mortgage on the Sixth and University property which amounted to \$54,582.22 at the end of 1946. It had been reduced to about \$45,000 at the end of 1947. (R. 114-115.)

The trust borrowed money from John Danz and from Sterling Theatres, Inc., at three per cent during the taxable years. John had to borrow money at interest rates in excess of three per cent to make the loans to the trust. The loans payable of the trust at the end of 1943 amounted to \$138,321.06. They were about \$4,000 less at the end of 1944 and amounted to about \$1,800 at the end of 1945. They amounted to \$109,000 at the end of 1946 and to \$89,500 at the end of 1947. (R. 115.)

The trust purchased a retail candy shop on September 10, 1943, for \$1,514.75, another on September 22, 1943, for \$875, and a third on January 31, 1944, for \$1,500. It operated each shop after the purchase throughout the taxable years but at some undisclosed time thereafter ceased operating them. Each candy shop was adjacent to a theatre owned or managed by

Sterling Theatres, Inc. Jessie Danz managed the three candy shops without pay because she wanted to make a contribution in that way to the acquisition of funds for the charitable trust. (R. 115.)

The net worth of the trust, as shown on its balance sheets, increased from \$65,862.62 at the end of 1943 to \$448,420.09 at the end of 1947. (R. 115.)

The average of the annual gross receipts from the Savoy Hotel for the taxable years was about \$141,000, the operating expenses about \$96,400, and the net income about \$44,600. The trust had additional income from rentals during the taxable years ranging from \$2,270 in 1943 to \$12,564.50 in 1945. The total sales of the candy shops during the taxable years were \$329,-233.95, the net sales \$158,689.10, expenses \$106,435.75, and the net profits from the operation, including a small amount of income from telephones, were \$52,-650.44. Dividends received by the trust during the taxable years amounted to \$23,458.10. The total net income of the trust for the taxable years, including profits on sales, was \$404,526.29. (R. 115-116.)

The trust made no distributions in 1943. Thereafter, it made distributions to a number of organizations, exempt from tax under Section 101 of the Internal Revenue Code, of the types described in Sections 23 (o), 812 (d) and 1004 (a) (2). The total of those charitable contributions was \$65,637.54, of which about two-thirds was contributed in 1947. (R. 116.)

The Humanist Society of Washington occupied a large portion of the Sixth and University building rent-free from the time of the inception of that organization. The trust received rent from some other space in that building. The building in San Francisco was occupied

rent-free by the Humanist Society of San Francisco. (R. 116.)

The intention of the trustees in purchasing the Savoy Hotel property was to operate it only until the personal property could be sold and the real property leased to a hotel operator. Efforts were made to find such a lessee but no satisfactory arrangement was made until January 1, 1948. The hotel, at the time it was purchased by the trust, was being operated by a real estate company in Seattle and that company continued to operate the property for the trust under an oral agreement during the taxable years and until January 1, 1948, when the furnishings were sold for \$60,000 and the real estate was leased to a hotel operator. (R. 116-117.)

The trust made no loans to the grantors and no joint investments with anyone during the taxable years. (R. 117.)

On September 19, 1946, the trust filed with the Collector of Internal Revenue an exemption affidavit on Form 1023, together with returns on Form 990 for the calendar years 1943, 1944 and 1945 (Joint Exhibits 2B, 3C and 4D). On November 22, 1946, a letter was written to the trustees of the trust by the Acting Deputy Commissioner of Internal Revenue to the effect that the trust was not exempt and requiring the filing of income tax returns for the trust for all years. Reconsideration was thereafter requested and on July 3, 1947, the Commissioner of Internal Revenue wrote the trustees of the trust that upon reconsideration of the matter the previous conclusion was affirmed and that returns must be filed. On the same date the Collector, pursuant to the Commissioner's ruling, wrote demanding the filing

of income tax returns for the trust from the date the trust was created. The Form 990 return for the year 1946 (Joint Exhibit 5E) filed by the trust on May 9, 1947, was not accepted by the Commissioner. (R. 83-84.)

On July 28, 1947, income tax returns on Form 1041 were filed by the trust for the calendar years 1943, 1944, 1945 and 1946 (Joint Exhibits 6F, 7G, 8H and 9I). The returns were accompanied by a letter from trustee William Danz stating that the returns were being filed in accordance with the Collector's request but that the trustees did not agree that returns should be filed and believed that the trust was exempt from tax. A return on Form 1041 for the year 1947 (Joint Exhibit 10J) was not filed until May 6, 1948. (R. 84.)

In each of the returns on Form 1041 the trust showed the income and expenses, took deductions for contributions paid during the year, and took a deduction in the amount of the balance of the income of the trust claimed to constitute income which, pursuant to the terms of the trust agreement, was permanently set aside for exempt purposes under Section 162 (a) of the Code. (R. 84-85.)

On December 7, 1949, a consent was executed by the trust and the Commissioner extending the time for assessment of tax for 1946 to June 30, 1951. (R. 85.)

On October 14, 1949, the Commissioner mailed to the trust a notice of deficiency in taxes in the total amount of \$136,944.45 for the years 1943, 1944 and 1945. On March 5, 1951, the Commissioner mailed to the trust a notice of deficiency in taxes for 1946 and 1947 in the total amount of \$52,898.65, together with a penalty of \$1,967.96 for 1947. (R. 85.)

On the issues appealed, the Tax Court held that the trust is not exempt from tax under Section 101 (6) of the Code (R. 118-120); that its income for the taxable years was not permanently set aside for charitable purposes so as to be deductible under Section 162 (a) (R. 123-125); and that collection of the deficiency taxes for 1943, 1944 and 1945 is not barred by the three-year statute of limitations by reason of the filing of Form 990 returns for those years on September 1, 1946 (R. 126-128).

SUMMARY OF ARGUMENT

1. The Tax Court held that taxpayer was not "organized and operated exclusively for * * * charitable * * * purposes" within the meaning of Section 101 (6) of the Internal Revenue Code and therefore is not exempt from tax. That holding is clearly correct, for two reasons. First, exemption must rest in the first instance upon a functional charitable activity and taxpayer was not organized or operated to engage in any functional charitable activity. Secondly, exemption is accorded only to such organizations engaged in a functional charitable activity as are "exclusively" so engaged and taxpayer was operated for the non-charitable purpose of conducting trades and businesses for profit. There is no merit in taxpayer's contention that exemption must be accorded to it simply because the trust fund is ultimately destined for such exempt organizations as John Danz designates.

Contrary to taxpayer's assertion, there is no long line of decisions applying ultimate destination as the sole test of exemption. *Roche's Beach, Inc. v. Commissioner*, 96 F. 2d 776 (C.A. 2d), the supposed originator of that theory, and *Willingham v. Home Oil Mill*, 181 F. 2d 9 (C.A. 5th), certiorari denied, 340 U. S. 852,

held only that a corporation which was an operating medium of an exempt organization was exempt. In effect, those decisions attributed the functional charitable activities of the parent to the subsidiary, as this Court appears also to have done in *Squire v. Students Book Corp.*, 191 F. 2d 1018. In the present case there is no basis for attributing any functional charitable activity to taxpayer. The recent decisions in *C. F. Mueller Co. v. Commissioner*, 190 F. 2d 120 (C.A. 3d), and *Sico Co. v. United States*, 102 F. Supp. 197 (C. Cls.), are the only decisions which may be said to support application of ultimate destination as the sole test of exemption. Those decisions are contrary to this Court's decision in *Bear Gulch Water Co. v. Commissioner*, 116 F. 2d 975, certiorari denied, 314 U. S. 652, and to *United States v. Community Services*, 189 F. 2d 421 (C.A. 4th), certiorari denied, 342 U. S. 932, and *Stanford University Book Store v. Helvering*, 83 F. 2d 710 (C.A.D.C.). See also, *Mabee Petroleum Corp. v. United States* (C.A. 5th), decided April 17, 1953 (1953 P-H, par. 72,474).

For a number of reasons it is clear that Section 101 (6) does not exempt a trust to which no functional charitable activity can even be attributed. The fact that the trust fund is ultimately destined only for exempt organizations means no more than that the trust fulfills the requirement of Section 101 (6) that no part of its net earnings inure to any private individual. Section 101 (6) also requires that the trust be "organized and operated exclusively for * * * charitable * * * purposes," which, unless meaningless, is a functional requirement. That Congress intended it as a functional requirement is evident from considera-

tion of subdivision (14) of Section 101, which alone relates to exemption on the basis of destination of income; Section 162 (a), which provides an unlimited deduction (as distinguished from exemption) by reason of the destination of trust income but restricts the deduction to amounts paid or permanently set aside during the taxable years for payment to charity; the legislative intent reflected in 1935 when the language of Section 101 (6) was adopted in Section 811 (b)(8) of the Social Security Act; and the legislative intent and understanding as reflected in the Revenue Act of 1950. By Section 301 of the 1950 Act Congress taxed the "unrelated business net income" of *exempt* organizations, defined as income from any trade or business not substantially related, aside from "the use it makes of the profits derived", to the exercise or performance of the charitable "purpose or function constituting the basis for its exemption under section 101". There is no excuse for not applying this clear reflection of the Congressional intent to Section 101 (6), for the section was not changed by the 1950 Act.

Taxpayer was not operated "exclusively" for charitable purposes, as required for exemption under Section 101 (6). Viewing its purposes most liberally and assuming that a functional charitable activity is unnecessary for exemption, it had two purposes—the conduct of business enterprises for profit and the contribution of the trust funds to charity—one of which was charitable and one not. Section 302 (a) of the 1950 Act provided that, for years prior to 1951, an organization is not to be denied exemption if its business income is substantially related to the exercise of its functional charitable activities—which clearly implies that exemption is to be denied in the converse

situation. That indeed was the implied Congressional intent from the consistent reenactment of Section 101 (6) despite long-standing Treasury Regulations to the effect that exemption is not even to be accorded a religious organization which also manufactures and sells articles to the public for profit. The decisions which have accorded exemption to an organization despite the fact that it was engaged in the operation of an unrelated trade or business, including *Roche's Beach*, are contrary to several decisions, including this Court's decision in *Bear Gulch Water Co.* and the Supreme Court's decision in *Trinidad v. Sagrada Orden*, 263 U. S. 578.

2. Section 162 (a) of the Code allows an unlimited deduction for any part of the trust income which, pursuant to the trust instrument creating the trust, was during the taxable years paid or permanently set aside for payment to exempt organizations or which is to be used directly by the trust for charitable purposes. None of the instant trust income was to be used directly by the trust for charitable purposes, for the trust was not organized or operated to engage in any functional charitable activity. The amounts of trust income actually paid out during the taxable years to exempt organizations pursuant to John Danz's designation have been allowed as deductions. Taxpayer is therefore entitled to additional deductions only for trust income which, pursuant to the trust instrument, was during the taxable years permanently set aside for payment to exempt organizations. As the Tax Court held, none of taxpayer's income was so permanently set aside.

The trustees did not permanently set aside any of the trust income during the taxable years and there is no

merit in taxpayer's contention that the trust instrument itself did. Aside from the trust income actually paid to exempt organizations during the taxable years, the trust instrument required only that the trust fund remaining at John Danz's death be paid to such exempt organizations as he directed in his will. In the meantime the trustees were authorized to use the trust income in carrying on any trade or business, for speculative investments, etc., and all or a part of it might be lost and never go to any exempt organization. It is well settled that, when the trust instrument authorizes a use of the trust income which gives rise to a possibility that it will not go to an exempt organization, the income is not during the taxable years permanently set aside for payment to charity.

Taxpayer's miscellaneous contentions are without merit. This is not a case where the trust instrument simply permitted investment of income required to be permanently set aside for charity. Nor does Section 23 (o), allowing a different charitable deduction to individuals, have any bearing on an interpretation of Section 162 (a), which is stated to allow a charitable deduction to trusts in lieu of that allowed individuals under Section 23 (o). That business income is deductible under Section 162 (a) is no aid to taxpayer. The controlling fact is that no part of the trust income from any source was during the taxable years permanently set aside for payment to charity.

3. The filing of Forms 990 by taxpayer did not start the running of the three-year limitations period under Section 275 (a) for the assessment of income taxes so as to bar the deficiencies for 1943, 1944 and 1945. Section 302 (b) of the Revenue Act of 1950 provides when, for

years prior to 1951, Forms 990 will start the running of the limitations period. That statute excludes taxpayer's Forms 990.

The Forms 990 taxpayer filed for 1943, 1944 and 1945 were not returns required to be filed by Section 54 (f), let alone substitutes for income tax returns. Under Section 142 (a) and the pertinent Regulations, taxpayer was required to file fiduciary income tax returns on Form 1041 until it established to the satisfaction of the Commissioner that it was tax-exempt. The Regulations set forth the information required to establish a claim of exemption. Along with such information, the claimant is to file one Form 990 covering its business for the preceding year. In 1943, 1944 and 1945 taxpayer neither filed Forms 1041 nor claimed exemption. Had it claimed exemption beginning in 1943, it would only have been required by the Regulations to file a Form 990 for 1942, the year immediately preceding the taxable years. Taxpayer claimed exemption for the first time in 1946, when it filed Forms 990 for 1943, 1944 and 1945 along with an affidavit designed to establish exemption. Since it was denied exemption, the Forms 990 could not possibly constitute "returns" required to be filed by Section 54 (f), which requires annual information returns only of exempt organizations. Taxpayer is simply seeking to take advantage of its own disregard of Section 142 (a) and the Regulations.

Even if the Forms 990 had constituted returns required to be filed by Section 54 (f), they would not have been sufficient to start the running of the statute of limitations as to income taxes. They could not be considered as substitutes for income tax returns on Form 1041 unless they contained all the data necessary for the

computation and assessment of income taxes and furnished that information with the uniformity, completeness and arrangement of an income tax return. They did not do so.

ARGUMENT

I

The Trust Was Not “Organized and Operated Exclusively for * * * Charitable * * * Purposes” Within the Meaning of Section 101(6) of the Internal Revenue Code and Therefore Is Not Exempt from Tax

A. Preliminary

For the John Danz Charitable Trust to be exempt from tax under Section 101 (6) of the Internal Revenue Code (Appendix, *infra*) not only must no part of its net earnings inure to the benefit of any private individual but it must be a foundation “organized and operated exclusively for * * * charitable * * * purposes”. It meets the requirement that no part of its net earnings inure to any private individual, because the trust fund is payable only to exempt organizations, but it is simply by reason of that fact that the trust contends that it meets the additional requirement that it be “organized and operated exclusively for * * * charitable * * * purposes”.

The trust was not created to carry on any functional charitable activity, did not do so, and was in no way related to any exempt organization which did. As the Tax Court found (R. 110), the trust was created on December 31, 1942, by John Danz and his wife “for the purpose of making and supplying money” to charitable organizations concerned with educating the people with respect to an acceptable common philosophy. Disposi-

tion of trust funds was not so limited, however. Trust funds could be paid to any exempt organization, and in such amounts as John Danz, one of the grantors, designated. Trust funds were in fact paid to a number of unrelated exempt organizations, including the Red Cross, March of Dimes, American Cancer Society, and Boys' Town. (See R. 39, 76-77.) The trustees were given broad powers over the trust property, including the power to carry on any trade or business on behalf of the trust estate and to use funds or property of the trust estate in such trade or business. The trust did in fact engage in business, the operation of the Savoy Hotel and three candy stores. Its sole claim to exempt status under Section 101 (6) is that during the lifetime of John Danz trust funds are to be paid only to such exempt organizations as he designates and at his death the remainder is to be paid to such exempt organizations as he designates in his will.

The case thus presents for decision the question whether the trust is exempt from tax under Section 101 (6) *solely* by reason of the ultimate destination of its profits and property. In *Squire v. Students Book Corp.*, 191 F. 2d 1018, 1020, this Court stated that it had "itself made no definite pronouncement on the subject". In that decision the Court also stated that most of the courts confronted with the problem "appear" to have applied the "'ultimate destination' test" (p. 1020) and taxpayer assumes that there is a "long line of cases supporting" the view that exemption under Section 101 (6) "is determined by the destination of the income" (Br. 21). Actually, that is not true, as we shall show. Even *Roche's Beach, Inc. v. Commissioner*, 96 F. 2d 776 (C.A. 2d), the supposed originator of the ultimate desti-

nation theory, is distinguishable from the instant case. *United States v. Community Services*, 189 F. 2d 421 (C.A. 4th), certiorari denied, 342 U. S. 932, and *Mabee Petroleum Corp. v. United States* (C.A. 5th), decided April 17, 1953 (1953 P-H, par. 72,474), are directly contrary to any idea that the ultimate destination of income is the *sole* test of exemption under Section 101 (6). Even this Court's own decision in *Bear Gulch Water Co. v. Commissioner*, 116 F. 2d 975, certiorari denied, 314 U. S. 652, is inconsistent with any such idea.

B. *Ultimate destination of income has not been established or even generally accepted by the courts as the sole test of exemption*

It was only in the recent cases of *C. F. Mueller Co. v. Commissioner*, 190 F. 2d 120 (C.A. 3d), and *Sico Co. v. United States*, 102 F. Supp. 197 (C. Cls.) (which are contrary to *United States v. Community Services*, *supra*, and inconsistent with *Mabee Petroleum Corp. v. United States*, *supra*) that ultimate destination of income was applied as the *sole* test of exemption under Section 101 (6). Ironically, those decisions applied that test under the mistaken notion that it was, as the Third Circuit called it in *Mueller* (p. 121), "established rationale".

To apply ultimate destination of income as the *sole* test of exemption under Section 101 (6) means that (1) an organization is considered to have a charitable purpose even though it does not itself carry on any functional charitable activity and is not even related to an organization which does and (2) that such an organization may be considered to be operated "exclusively" for charitable purposes even though it carries on a trade or

business for profit.⁴ Most of the decisions cited in *Mueller* for such an “established rationale” do not in fact support it. *Trinidad v. Sagrada Orden*, 263 U. S. 578, the leading case, held that an organization which was *itself* engaged in carrying on religious, charitable and educational activities was “operated exclusively” for those purposes even though it received negligible profits from transactions in wine, chocolate and other articles which, instead of having financial gain as their end and amounting to a trade or business, were merely incidental to the organization’s religious, charitable and educational activities. Four of the other cases cited in *Mueller* were also cases in which the taxpayer-organization was *itself* engaged in a functional charitable activity. *Debs Memorial Radio Fund v. Commissioner*, 148 F. 2d 948 (C.A. 2d); *Bohemian Gymnastic Ass’n Sokol of City of N.Y. v. Higgins*, 147 F. 2d 774 (C.A. 2d); *Commissioner v. Orton*, 173 F. 2d 483 (C.A. 6th); *Commissioner v. Battle Creek*, 126 F. 2d 405 (C.A. 5th). In all of those cases except *Debs Memorial Radio Fund* the taxpayer’s commercial activity was incidental to its charitable activity, as in *Trinidad*. In *Debs Memorial Radio Fund* the commercial activity, consisting of accepting radio advertising, was not merely incidental to the taxpayer’s charitable activity but on the other hand was related to it and was necessary. *Universal Oil Products Co. v. Campbell*, 181 F. 2d 451 (C.A. 7th), certiorari denied, 340 U. S. 850, also cited in *Mueller*,

⁴ For convenience, throughout this brief we shall refer to Section 101(6) as relating only to charitable organizations. The section of course covers organizations organized and operated for religious, charitable, scientific, literary, or educational purposes, or for the prevention of cruelty to children or animals.

opposes rather than supports the theory that ultimate destination of income is alone controlling.⁵

There are really only four decisions (*Roche's Beach, Inc. v. Commissioner, supra*; *Willingham v. Home Oil Mill*, 181 F. 2d 9 (C.A. 5th), certiorari denied, 340 U. S. 852; *C. F. Mueller Co. v. Commissioner, supra*; *Sico Co. v. United States, supra*) which even appear to accord exemption to an organization *solely* because of the ultimate destination of its income. As will be shown shortly, *Roche's Beach* and *Home Oil Mill* do not actually do so.

All four decisions misinterpret and misapply *Trinidad v. Sagrada Orden, supra*, and are essentially in conflict with this Court's decision in *Bear Gulch Water Co. v. Commissioner, supra*, and with the following: *Stanford University Book Store v. Helvering*, 83 F. 2d 710 (C.A. D.C.); *Universal Oil Products Co. v. Campbell, supra*; *United States v. Community Services, supra*; cf. *Gagne v. Hanover Water Works Co.*, 92 F. 2d 659 (C.A. 1st). The four decisions are also in conflict with decisions holding that even an organization which itself carries on a charitable activity is not exempt if it has an additional purpose which is not charitable. See, e.g., *Better Business Bureau v. United States*, 326 U. S. 279; *Smyth v. California State Automobile Ass'n*, 175 F. 2d 752 (C.A. 9th), certiorari denied, 338 U. S. 905; *Chattanooga Auto. Club v. Commissioner*, 182 F. 2d 551 (C.A. 6th). As the Fourth Circuit recognized in *Community Services* (p. 428), a great number of cases can be cited in which both the decisions

⁵ *Mueller* also cited old Tax Court decisions in support of the "established rationale". Actually, as the Tax Court stated in the present case (R. 119-120), it has in recent years adhered to the opposite view.

and views expressed are so varied and divergent as to be irreconcilable.

C. Even Roche's Beach and Home Oil Mill did not accord exemption solely on the basis of ultimate destination of income; neither decision supports exemption of a trust which, in addition to not carrying on any functional charitable activity itself, is in no way related to any exempt organization

Roche's Beach is the forerunner of and supposed authority for *Home Oil Mill*, *Mueller* and *Sico Co.* Actually, *Roche's Beach* and *Home Oil Mill* are distinguishable from *Mueller* and *Sico Co.*

In *Roche's Beach* (in which Judge Learned Hand dissented) the corporation held to be exempt was one which the court stated (p. 776)—

was organized by Edward Roche shortly before his death for the purpose of being the medium through which a charitable foundation created by his will [and holding all of the stock of the corporation] could operate his property and collect the income therefrom after his death. * * *

The court's conclusion that "As a question of fact, it seems clear that the corporation was organized and operated exclusively for charitable purposes" was based on three facts—that the proceeds from the corporation's activities were turned over to the charitable foundation established by Roche's will, that (p. 778)—

The Board made a finding that Roche organized the corporation for the purpose of being the medium through which this foundation could operate the property and collect income after his death. * * *

and that Roche's will referred to the corporation and made manifest that the income produced by the corporation could not be used for other than charitable purposes without a perversion of the testamentary trust. The court stated that a corporation "organized and operated exclusively for * * * charitable * * * purposes" does not mean that to come within the exemption a corporation may not conduct business activities for profit and that "The destination of the income is more significant than its source." (P. 778.) The court then went on to hold that the exemption should not be denied the corporation merely because it did not itself perform a charitable function. In *Home Oil Mill*, where the stock of the taxpayer-corporation was bequeathed to a charitable trust and the corporation was stated to have been reorganized to exist solely and exclusively for religious, charitable and educational purposes, the Fifth Circuit recognized what *Roche's Beach* had really held. The court there stated that (p. 10)—

If it is possible for a religious, charitable, and educational trust to operate an industry through a corporate agency, and be exempt under Section 101 (6) of Title 26 U.S.C.A., the appellant is entitled to such exemption.

and, on the authority of *Roche's Beach* and *Trinidad v. Sagrada Orden, supra*, held the corporation to be exempt.⁶ In the very recent case of *Mabe Petroleum Corp. v. United States*, decided April 17, 1953 (1953 P.H., par. 72,473), the Fifth Circuit, which decided *Home Oil Mill*, denied exemption to a corporation whose profits were

⁶ The decision was also placed on the ground of equitable estoppel.

all payable to a charitable foundation and whose stock was even owned by the charitable foundation.

Neither *Roche's Beach* nor *Home Oil Mill* stated that the corporation involved was "organized and operated exclusively" for charitable purposes simply because its income was payable to an exempt organization. In fact, in *Roche's Beach* the Second Circuit stated that "The destination of income is more significant than its source" (p. 778), rather than that the destination of income is conclusive as to the right to exemption. That the Fifth Circuit does not regard its *Home Oil Mill* decision as authority for the proposition that the charitable destination of income is sufficient of itself to support exemption is evident from its recent *Mabee Petroleum Corp.* decision, in which the court relied upon this Court's *Bear Gulch Water Co.* decision and *Universal Oil Products Corp. v. Campbell, supra*. The decisions in both *Roche's Beach* and *Home Oil Mill* obviously resulted in large part from the fact that in each instance the corporation involved, although a separate entity, was intended to be and was an operating medium for an exempt organization which owned all its stock. What the courts there really did was to consider a charitable trust and its operating medium as one, attributing to the operating medium the functional charitable purposes of the exempt charitable trust. This Court apparently did the same thing in *Squire v. Students Book Corp., supra*, where there was some factual basis for doing so.

Conversely, exemption has been denied because of the lack of such a relationship. *Stanford University Book Store v. Helvering, supra*, involved a cooperative association organized for the purpose of carrying on a gen-

eral mercantile business for the accommodation of the students and faculty of Leland Stanford Junior University. The Court of Appeals for the District of Columbia there stated (p. 712):

We think that the record conclusively shows that the association is not "a corporation organized and operated exclusively for educational purposes." It must be remembered that the association is not, in contemplation of law, a division or part of the university. The university as such does not own any interest in the association, is not responsible for its debts, is not entitled to any part of its earnings, and takes no part in conducting and managing its affairs. The two institutions are separate legal entities and *therefore the attributes of the university cannot be attributed to the association*, nor can the latter claim to be an educational institution * * *. * * *(Italics supplied.)

In the present case (as was also true in *Mueller and Sico Co.*) there is no basis for attributing functional charitable purposes to the trust. There is no relationship between the trust and any exempt organization or between the trust's activities and those of any exempt organization. All we have is a trust whose profits and property are ultimately to be contributed to such charities as John Danz, one of the grantors, may designate. No specific charitable organization has a right to receive any portion of the trust fund at any time; the trust's contributions to exempt organizations, to be made at John Danz's direction, are not even limited to any particular type of exempt organization. *Roche's Beach* and *Home Oil Mill* do not support exemption

in such a case. Here, as the Fourth Circuit stated in *Community Services* (p. 425):

For tax-exemption purposes, the charitable nature of the distributees of its income cannot be attributable to the taxpayer. * * *

D. *Exemption must be denied in a case where, as here, no functional charitable activity can even be attributed to the trust*

Mueller and Sico Co. are the only decisions (so far as we are aware) which hold an organization to be exempt from tax solely because of the ultimate destination of its profits.⁷ In neither of those cases, unlike *Roche's Beach* and *Home Oil Mill*, was the organization involved an operating medium of an exempt organization through stock ownership or otherwise (although *Mueller* was later to become one), and there was thus no basis for attributing functional charitable activities to the organization. A functional charitable activity is a condition to exemption under Section 101 (6), as we shall now show. The statute does not exempt an organization, like the instant trust, to which functional charitable activities cannot even be attributed.⁸

1. Section 101 (6) provides three general conditions to exemption. Two of them are that the organization be "organized and operated exclusively for * * * charitable * * * purposes" (which can be broken down into two requirements, organization and operation for charitable purposes (*Universal Oil Products Co. v.*

⁷ The Government's failure to petition for a writ of certiorari in those cases should not be taken as indicating approval of the decisions.

⁸ So far as the instant case is concerned, it is academic whether or not it is proper to ignore the separate entity of an operating medium of an exempt corporation and attribute to it the functional charitable activities of the exempt organization.

Campbell, supra, p. 457) and that “no part of the net earnings of which inures to the benefit of any private shareholder or individual”. The instant trust fulfills the second requirement, since its profits may be paid only to exempt organizations. But it is on the basis of that fact alone—the fulfillment of the second requirement—that the trust is claiming exemption. Obviously, it must also meet the first requirement and certainly Congress did not intend that requirement to be meaningless, as being fulfilled by meeting the second requirement. The first requirement—that the organization be “organized and operated exclusively for * * * charitable * * * purposes”—is clearly a *functional* requirement. *United States v. Community Services, supra*; *Bear Gulch Water Co. v. Commissioner, supra*; *Universal Oil Products Co. v. Campbell, supra*; cf. *Gagne v. Hanover Water Works, supra*; *Sun-Herald Corp. v. Duggan*, 160 F. 2d 475 (C.A. 2d). As stated in *Community Services* (p. 425)—

The corporation earning the income and claiming the exemption, rather than the recipients of the income, must be organized and operated exclusively for charitable purposes.

2. Such a construction of Section 101 (6) is confirmed by subdivision (14) of Section 101 (Appendix, *infra*). In that subdivision Congress addressed itself to situations in which a corporation, which does not itself qualify for exemption under subdivision (6) or one of the other subdivisions of that section, dedicates its income to another organization which does qualify. Section 101 (14) exempts from tax the following:

Corporations organized for the exclusive purpose of holding title to property, collecting income there-

from, and turning over the entire amount thereof, less expenses, to an organization which itself is exempt from the tax imposed by this chapter;

* * *

Thus, Congress was fully aware of the possibility that the net earnings of an organization which is not itself organized and operated exclusively for exempt purposes might be destined for other organizations which were so organized and operated, such as an exempt church or university. Yet it saw fit to limit the exemption in such cases to corporations and only to those whose function was that of "holding title to property, collecting income therefrom, and turning over the entire amount thereof, less expenses", to exempt organizations. When Section 101 (14) is read together with Section 101 (6), as it must be (*Better Business Bureau v. United States, supra; Keystone Automobile Club v. Commissioner*, 181 F. 2d 402 (C.A. 3d)), it is manifest that Congress intended to accord tax exempt status to an organization on the basis of its own purposes and activities, not those of the recipients of its income, except in one type of situation—where a corporation serves merely as a holding and collecting medium for exempt organizations.

As the Fourth Circuit stated in *Community Services* (p. 425):

Had Congress intended to accord tax exempt status to a corporation, regardless of the nature of its own activities, solely because its profits are distributed to exempt organizations, it would have been an easy matter to say this, simply and clearly.

Instead, in Section 101 (14) Congress carefully circumscribed the exemption of distributing organizations by

exempting only corporations whose exclusive purpose is of "holding title to property, collecting income therefrom, and turning over the entire amount thereof, less expenses" to exempt organizations.

To construe Section 101 (6) as exempting any organization whose income is destined for exempt organizations is to render meaningless the express limitations contained in Section 101 (14). Unless the requirements of Section 101 (14) are to be discarded as sheer surplusage, the conclusion is inescapable that organizations engaged in ordinary business activities are not entitled to exemption under Section 101 (6) merely because their profits inure to the benefit of exempt organizations. See *Bear Gulch Water Co. v. Commissioner*, 116 F. 2d 975 (C.A. 9th), certiorari denied, 314 U. S. 652; *Gagne v. Hanover Water Works Co.*, 92 F. 2d 659 (C.A. 1st); and *Universal Oil Products Co. v. Campbell*, 181 F. 2d 451 (C.A. 7th), certiorari denied, 340 U.S. 850. As Judge Learned Hand stated in his dissenting opinion in *Roche's Beach* (p. 779)—

It is possible that, if subdivision 14 had not been added to section 103, 26 U.S.C.A., § 103 (14) and note, we ought to have read subdivision 6, 26 U.S.C.A. § 103 (6) note, to comprise companies all of whose profits go to one of the purposes therein described, although *Trinidad v. Sagrada Orden*, 263 U.S. 578, * * * gives no color to such an interpretation; rather the reverse, for the business income of the taxpayer was there very trifling. * * * But subdivision 14 precludes any such reading. Obviously, as to all other subdivisions it meant that a subsidiary should not be exempted merely because its parent was exempt; that was indeed one condition, but the subsidiary must also confine its activi-

ties to the mere receipt of income. * * * The purpose of subdivision 14 was to tax all business income, however, destined, unless the company was really not in business at all. * * *

It should particularly be noted that the meaning of subdivision (14)—that “a *subsidiary* should not be exempted merely because its *parent* was exempt” (italics supplied)—goes even further than is required in the present case, where we have no subsidiary and parent, and that Judge Hand was interpreting the majority decision in *Roche’s Beach* for what it was—a holding that a subsidiary was exempt because its parent was exempt.

3. That Congress did not intend to accord tax exemption to a trust merely because its income is ultimately destined for exempt organizations is confirmed by Code Section 162 (a) (Appendix, *infra*), which in the taxable years provided in pertinent part as follows:

SEC. 162. NET INCOME.

The net income of the estate or trust shall be computed in the same manner and on the same basis as in the case of an individual, except that—

(a) There shall be allowed as a deduction (in lieu of the deduction for charitable, etc., contributions authorized by section 23 (o)) any part of the gross income, without limitation, which pursuant to the terms of the will or deed creating the trust, is during the taxable year paid or permanently set aside for the purposes and in the manner specified in section 23 (o), or is to be used exclusively for religious, charitable, scientific, literary, or educational purposes, or for the prevention of cruelty to children or animals. * * *

In allowing the deduction "without limitation" as to income which, pursuant to the deed or will creating the trust, is actually paid or permanently set aside in the taxable year for charity, Congress recognized that the entire income of a trust may be destined for charity. Nevertheless, it provided for a deduction, rather than exemption, by reason of the destination of the trust income and even limited the deduction. The grant of the right to take a deduction and the imposition of a restriction on the deduction are obviously inconsistent with any idea that a trust is altogether exempt from tax simply because its income is ultimately destined for charitable organizations.

The exemption accorded by Section 101 (6) also of course covers corporations which fulfill the necessary requirements. In the case of corporations, charitable deductions are limited by Code Section 23(q)(2) to an amount not exceeding five per cent of net income.⁹ That section too is inconsistent with any idea that Section 101 (6) exempts from tax the entire net income of an organization simply because the income is ultimately destined for charitable organizations.

4. The legislative intent with respect to Section 101 (6) was affirmatively reflected in 1935 when the lan-

⁹ Section 23(q), as amended by Section 125 of the Revenue Act of 1942, c. 619, 56 Stat. 798, permits a corporation to deduct, to an extent not exceeding five per cent of its net income—

contributions or gifts payment of which is made within the taxable year to or for the use of:

* * * *

(2) A corporation, trust, or community chest, fund or foundation * * * organized and operated exclusively for religious, charitable, scientific, literary, or education purposes * * * no part of the net earnings of which inures to the benefit of any private shareholder or individual * * * .
* * *

guage of Section 101 (6) was adopted in Section 811 (b)(8) of the Social Security Act, c. 531, 49 Stat. 620. The Committee Reports accompanying that Act state (H. Rep. No. 615, 74th Cong., 1st Sess., p. 33 (1939-2 Cum. Bull. 600, 607; S. Rep. No. 628, 74th Cong., 1st Sess., p. 54 (1939-2 Cum. Bull. 611, 621)) :

The organizations which will be exempt from such taxes are churches, schools, colleges, and other educational institutions not operated for private profit, the Y.M.C.A., the Y.W.C.A., the Y.M.H.A., the Salvation Army, and other organizations which are exempt from income tax under Section 101 (6) of the Revenue Act of 1932.

5. As we shall show, provisions added by the Revenue Act of 1950, c. 994, 64 Stat. 906, clearly reflect the Congressional intent and understanding that Section 101 (6) does not exempt an organization to which a functional charitable activity cannot even be attributed. Taxpayer does not deny that subsequent legislation may be considered to aid in the interpretation of prior legislation (see *Great Northern Ry. Co. v. United States*, 315 U. S. 262, 277; *Brewster v. Gage*, 280 U. S. 327, 337) and, in fact, attempts to turn the 1950 Act to its own advantage (Br. 28-32).

As taxpayer states (Br. 29), by Section 301 (a) of the 1950 Act (Appendix, *Infra*) Congress amended Section 421 of the Code to tax the "unrelated business income" of *exempt* organizations. The "unrelated business net income" of an *exempt* organization is defined in Section 422 (a) (added by Section 301 (a) of the 1950 Act) as the gross income derived by an organization from any "unrelated trade or business (as defined in subsection (b))" regularly carried on

by it, less deductions and with certain exceptions, additions and limitations. The term “unrelated trade or business” is defined in subsection (b) as—

any trade or business the conduct of which is not substantially related (*aside from the need of such organization for income or funds or the use it makes of the profits derived*) to the exercise or performance by such organization *of its charitable, educational, or other purpose or function constituting the basis for its exemption under section 101*, * * * (Italics supplied.)

Thus, by Section 301 of the 1950 Act an exempt organization is taxable on income from a trade or business which is not substantially related to the exercise or performance of the charitable “purpose or function constituting the basis for its exemption under section 101” and that quoted language does not include “the use it makes of the profits derived”. This unmistakably shows that Congress intended and understood that exemption under Section 101 rests upon a functional charitable activity. That intent and understanding must be applied to Section 101 (6) which, as taxpayer states (Br. 29), “was not changed by the 1950 Act”.

Section 301 (b) of the 1950 Act (Appendix, *infra*) added the following paragraph at the end of Section 101 of the Code:

An organization operated for the primary purpose of carrying on a trade or business for profit shall not be exempt under any paragraph of this section on the ground that all of its profits are payable to one or more organizations exempt under this section from taxation. For the purposes of this paragraph the term “trade or business” shall

not include the rental by an organization of its real property (including personal property leased with the real property).

This is further indication of the Congressional intent to preclude exemption of organizations not engaged in a functional charitable activity. Taxpayer, however, seeks to take advantage of the fact that this provision covers only organizations operated for the "primary" purpose of carrying on a trade or business. (Br. 28-32.) The provision is specifically applicable only to such organizations, but no conclusion can be drawn in taxpayer's favor from use of the word "primary". H. Rep. No. 2319, 81st Cong., 2d Sess., pp. 41-42, 124 (1950-2 Cum. Bull. 380, 412, 469) states:

Section 301 (b) of your committee's bill provides that no organization operated primarily for the purpose of carrying on a trade or business (other than the rental of real estate) for profit shall be exempted under section 101 merely on the grounds that all of its profits are payable to one or more organizations exempt from tax under this section. * * *

The effect of this amendment is to prevent the exemption of a trade or business organization under section 101 on the grounds that an organization actually described in section 101 receives the earnings from the operations of the trade or business organization. *In any case it appears clear to your committee that such an organization is not itself carrying out an exempt purpose.* * * * (Italics supplied.)

Moreover, no distinction can be drawn for years prior to 1951 on the basis of Section 301 (b) of the 1950 Act,

for Section 303 of the 1950 Act (Appendix, *infra*) provides that—

The determination as to whether an organization is exempt under section 101 of the Internal Revenue Code from taxation for any taxable year beginning before January 1, 1951, shall be made as if section 301 (b) of this Act had not been enacted and *without inferences drawn from the fact that the amendment made by such section is not expressly made applicable with respect to taxable years beginning before January 1, 1951.* (Italics supplied.)

Taxpayer ignores the basic requirement for exemption, arguing (Br. 29-30) that, because of the addition of the above paragraph at the end of Section 101 and the provisions taxing the “unrelated business net income” of exempt organizations, Congress must have understood the language of Section 101 (6) to include organizations which have business income but are not operated for the *primary* purpose of conducting a trade or business. Such an argument is directed merely to the *extent* of business income and assumes that exemption may rest on the destination of business profits, whereas Congress has clearly reflected its intent and understanding that exemption under Section 101 is accorded only to organizations which engage in a functional charitable activity. As we shall show later, there is no basis for taxpayer’s assertions as to the Congressional understanding even as related to organizations which *are* engaged in functional charitable activities.

6. It is no argument to say, as the Third Circuit did in *Mueller*, that Section 101 (6) must be given a liberal interpretation. Such an argument begs the issue by as-

suming that an organization which does not engage in a functional charitable activity is nevertheless a "charitable" organization within the meaning of the statute. It is a familiar rule of construction that tax exemptions are matters of legislative grace and are therefore to be strictly construed against the taxpayer. *Helvering v. Northwest Steel Mills*, 311 U. S. 46, 49; *Helvering v. Ohio Leather Co.*, 317 U. S. 102, 106. In any event, general rules of construction, while sometimes helpful in resolving ambiguities, cannot serve to defeat the plainly expressed legislative intent even where charitable or educational institutions are involved. *United States v. Community Services*, *supra*; *Universal Oil Products Co. v. Campbell*, *supra*; *Scholarship Endowment Foundation v. Nicholas*, 106 F. 2d 552 (C.A. 10th), certiorari denied, 308 U. S. 623. As the Supreme Court stated in *Better Business Bureau* (p. 283)—

Even the most liberal of constructions does not mean that statutory words and phrases are to be given unusual or tortured meanings unjustified by legislative intent or that express limitations on such an exemption are to be ignored. * * *

E. *Assuming arguendo that a trust may be organized and operated for charitable purposes within the meaning of Section 101 (6) even though no functional charitable activity can be attributed to it, exemption must still be denied the instant trust because it was not operated "exclusively" for charitable purposes*

If we assume arguendo that a charitable purpose under Section 101 (6) need not be a functional charitable activity, the instant trust may be regarded as hav-

ing a charitable purpose—the donation of its profits and property to such exempt organizations as John Danz designates. However, the trust's primary purpose was to make money for contribution to exempt organizations. Viewing its purposes most liberally, here, as in *Community Services, supra* (p. 424)—

Taxpayer was, in effect, organized and operated for two purposes: (1) to engage in commercial business, for profit, and (2) to turn over the profits realized from its commercial activities to charitable organizations. The second purpose is charitable; the first purpose clearly is not. * * *

Taxpayer's argument that it is nevertheless organized and operated "exclusively" for charitable purposes consists of an attempt to distinguish *Community Services* (Br. 22-32) on the ground that it involved an organization whose *primary* purpose was the operation of business enterprises. In that connection, taxpayer relies upon an interpretation of the 1950 Act which, as we shall show, is without basis. Presumably, taxpayer also relies upon *Roche's Beach, Home Oil Mill, Mueller and Sico Co.*, which in effect hold that an organization is organized and operated "exclusively" for charitable purposes even though one of its purposes or its sole purpose is to carry on a trade or business for profit. In that respect those decisions are clearly incorrect.

1. The 1950 Act not only refutes taxpayer's argument that *Community Services* is distinguishable on the ground that it involved an organization whose *primary* purpose was the operation of business enterprises, but supports the view that business activity unrelated to a functional charitable activity precludes exemption for years prior to 1951. As already shown, the specific

provision added by Section 301 (b) of the 1950 Act against exemption of an organization whose *primary* purpose is to carry on a trade or business for profit was added on the theory that such an organization is “not itself carrying out an exempt purpose”. (H. Rep. No. 2319, *supra*.) In any case in which that is true, as here and in *Community Services* exemption must be denied.

But, in addition, the 1950 Act clearly shows that, for years prior to 1951, the effect of business activity (even as to an organization engaged in a functional charitable activity) depends upon the nature, rather than the extent, of the trade or business in which the organization engages. Section 302 (a) of the 1950 Act (Appendix, *infra*) provided as follows:

SEC. 302. EXEMPTION OF CERTAIN ORGANIZATIONS
FOR PAST YEARS.

(a) *Trade or Business Not Unrelated*—For any taxable year beginning prior to January 1, 1951, no organization shall be denied exemption under paragraph * * * (6) * * * of section 101 of the Internal Revenue Code on the grounds that it is carrying on a trade or business for profit if the income from such trade or business would not be taxable as unrelated business income under the provisions of Supplement U of the Internal Revenue Code, as amended by this Act, or if such trade or business is the rental by such organization of its real property (including personal property leased with the real property). (Italics supplied.)

As we have already shown, “unrelated business income” means income from a trade or business which is not substantially related to the exercise or perform-

ance by an organization “of its charitable, educational, or other purpose or function constituting the basis of its exemption under section 101” *excluding* the destination of profits. (Section 301 (a) of the 1950 Act.) In taxing such income of *exempt* organizations, the 1950 Act treats an organization as exempt even though it has unrelated business income (provided it engages in a functional charitable activity to give it a basis for exemption), but we are here concerned with years prior to 1951. As to such years, Section 302 (a) of the 1950 Act has the effect of providing that an organization is not to be denied exemption if its business income is substantially related to the exercise or performance of its functional charitable activity or activities. The plain inference is that an organization which has business income which is *not* related to a functional charitable activity of the organization must be *denied* exemption for years prior to 1951. It is the nature, not the extent, of the business activity, which is material.

2. To the extent they hold that an organization may be exempt despite the receipt of unrelated business income, *Roche's Beach, Home Oil Mill, Mueller and Sico Co.* are contrary to several Court of Appeals decisions, including this Court's decision in *Bear Gulch Water Co. v. Commissioner, supra*. In that case the taxpayer-corporation was one whose stock was all owned by the regents of the University of California and, accordingly, its income and property had an exempt corporation as their ultimate destination but the taxpayer-corporation was not itself engaged in a functional charitable activity. This Court affirmed the Tax Court's decision that the corporation was not exempt under Section 101 (6) because its “business was a business enterprise conducted for gain”. (P. 977.) In

Community Services the Fourth Circuit denied exemption to a corporation whose charter stated that it was designed to conduct businesses in order to earn profits to be devoted exclusively to religious, charitable, scientific, literary and/or educational purposes. In *Universal Oil Products Corp. v. Campbell, supra*, the Seventh Circuit denied exemption to a corporation which was primarily (but not solely) a research organization and whose stock and income notes were held by an exempt trust whose beneficiary was the American Chemical Society, also admittedly tax-exempt. Cf. *Stanford University Book Store v. Helvering*, 83 F. 2d 710 (C. A. D. C.), where the Court of Appeals for the District of Columbia denied exemption to a cooperative association organized for the purpose of carrying on a general mercantile business for the accommodation of the students and faculty of Leland Stanford Junior University.

3. *Roche's Beach, Home Oil Mill, Mueller and Sico Co.* are contrary to the decisions of the Supreme Court in *Better Business Bureau v. United States*, 326 U. S. 279, and *Trinidad v. Sagrada Orden, supra*. Those decisions show that even an organization which is itself engaged in functional charitable activities is not exempt if it has a single, substantial non-charitable purpose.

In *Better Business Bureau* the Supreme Court denied exemption to a corporation whose charter stated that it was organized for the purpose of promoting better business ethics among merchants in the community and of educating the public regarding deceptive business practices, and its activities were directed towards those ends. The corporation had no stock and it was stipulated that no part of its earnings inured to

the benefit of any private shareholder or individual. Among other things, the Supreme Court there stated (p. 283):

In this instance, in order to fall within the claimed exemption, an organization must be devoted to educational purposes exclusively. *This plainly means that the presence of a single noneducational purpose, if substantial in nature, will destroy the exemption regardless of the number or importance of truly educational purposes.* * * * (Italics supplied.)

The *Trinidad* case involved a corporation which carried on religious, charitable and educational work with income consisting of rents, dividends, interest and negligible profits from transactions in wine, chocolate and other articles. The Government conceded both that the corporation was organized and operated for religious, charitable and educational purposes and that no part of its net income inured to the benefit of any stockholder or individual. The Government contended, however, that the corporation was not "operated exclusively" for religious, charitable and educational purposes because of the trading in wine, chocolate and other articles. In deciding the case in favor of exemption, the Supreme Court first noted that, in making its property productive by way of rents, dividends, and interest and applying such income to religious, charitable and educational purposes, the corporation was adhering to and advancing those purposes. With respect to the questioned activity—the transactions in wine, chocolate and other articles—the Court stated (p. 582):

* * * we think they do not amount to engaging in trade in any proper sense of the term. It is not

claimed that there is any selling to the public or in competition with others. The articles are merely bought and supplied for use within the plaintiff's own organization and agencies,—some of them for strictly religious use and the others for uses which are purely incidental to the work which the plaintiff is carrying on. That the transactions yield some profit is in the circumstances a negligible factor. Financial gain is not the end to which they are directed.

What *Trinidad* holds, therefore, is that a corporation which is organized to and does carry on functional charitable activities is “operated exclusively” for charitable purposes despite (1) the receipt of investment income and (2) the receipt of profits from transactions which, instead of having financial gain as their end and amounting to engaging in trade or business, are incidental to the charitable work in which the corporation is engaged. The necessary implication of the decision is that even a corporation engaged in functional charitable activities is not “operated exclusively” for charitable purposes if it engages in other activities which, instead of being incidental to the charitable activity, are conducted for financial gain and amount to engaging in a trade or business for profit. That is precisely what Congress intended and understood the rule to be, for, as we have already shown, the 1950 Act unmistakably reflected the Congressional intent and understanding that, for years prior to 1951, an exempt organization is one which has no business income *unrelated to its functional charitable activities*.

Trinidad did state at one point that the statute makes the destination of income the ultimate test of exemption (p. 581), but, as stated by the Seventh Circuit in

Universal Oil Products Co. v. Campbell, supra (p. 458)—

We must bear in mind, however, that there the Court was only considering whether an inconsequential portion of the income of the taxpayer derived from sales to its own members and agencies prevented it from being operated *exclusively* for charitable and educational purposes. The primary purpose of the organization and operation of the taxpayer was not in question.

Any possible doubt as to the proper interpretation of *Trinidad* has been removed by the statement of the Supreme Court in *Better Business Bureau* (p. 283) that “the presence of a single noneducational purpose, *if substantial in nature*, will destroy the exemption”. (Italics supplied.) There is now no possible excuse for following *Roche’s Beach*. The Third Circuit and Court of Claims erred in doing so in *Mueller* and *Sico Co.*, respectively.¹⁰

¹⁰ The *Mueller* decision reflects error and confusion on practically every point discussed, but the court’s fundamental error was in believing that a large number of cases, all with readily distinguishable facts, stood for the same proposition. That error appears not only from the court’s citation of cases in support of the so-called “established rationale”, already discussed, but from its criticism (190 F. 2d, p. 122, fn. 8) of *Community Services* as following—

the dissenting opinion of Judge Learned Hand in *Roche’s Beach* * * *, albeit Judge Hand agreed with *Bohemian Gymnastic Ass’n Sokol v. Higgins*, 1945, 147 F. 2d 774, and *Consumer-Farmer Milk Coop., Inc. v. Commissioner*, 2 Cir., 1950, 186 F. 2d 68, certiorari denied 1951, 71 S. Ct. 803, both of which follow the majority in the *Roche’s Beach* case.

The latter two decisions can hardly be said to have followed the majority in *Roche’s Beach* and certainly Judge Learned Hand’s concurrence in those decisions does not reflect any change in his early position. The business carried on in *Bohemian Gymnastic Ass’n Sokol of City of N. Y. v. Higgins, supra*, was incidental to the functional educational activities of the organization involved, as in

4. If the Congressional intent were not so clearly reflected in the 1950 Act for years prior to 1951, it would be pertinent to take cognizance of the *implied* Congressional intent reflected in long-standing Treasury Regulations and the reenactment of Section 101 (6). *Commissioner v. Flowers*, 326 U. S. 465, 469; *Boehm v. Commissioner*, 326 U. S. 287; *Helvering v. Winnmill*, 305 U. S. 79. Section 29.101(6)-1 of Treasury Regulations 111 (Appendix, *infra*) is derived from and is substantially the same as Article 517 of Treasury Regulations 65, promulgated under the Revenue Act of 1924. It provides that to qualify for exemption a corporation must be "organized and operated exclusively for one or more of the specified purposes" and that a religious organization "which also manufactures and sells articles to the public for profit" is not exempt even though its profits do not inure to private shareholders or individuals. Thus, the long-standing Treasury Regulations, which have the force and effect of law (*Better Business Bureau, supra*, p. 286) except to the extent, if any, they have been modified by the 1950 Act for

Trinidad. In *Consumer-Farmer Milk Coop. v. Commissioner*, 186 F. 2d 68 (C.A. 2d), certiorari denied, 341 U.S. 931, which involved the subdivision granting exemption to civic leagues or organizations not organized for profit but operated exclusively for the promotion of social welfare, exemption was *denied* a cooperative non-stock corporation on the ground that it was organized for profit as well as for the promotion of social welfare. Strangely, in that decision the Second Circuit stated, among other things, that (p. 71)—

To qualify for exemption, *profit derived from commercial activities must not only be incidental to the ultimate charitable purpose; it must also be devoted to that purpose.* * * *
(Italics supplied.)

The italicized portion of the statement, if accepted at face value, accepts our interpretation of *Trinidad*, as well as the Congressional intent and understanding as evidenced by the 1950 Act, and is inconsistent with the majority decision in *Roche's Beach*.

years prior to 1951, precluded exemption if the organization was engaged in a trade or business for profit.

II

No Part of the Trust Net Income Was, Pursuant to the Trust Instrument, Permanently Set Aside During the Taxable Years for Charitable Purposes so as to Be Deductible Under Section 162(a) of the Code

The full amounts actually paid by the trust to charitable organizations during the taxable years (pursuant to John Danz's direction) were allowed as deductions under Section 162 (a) of the Code in the agreed computation for entry of decision by the Tax Court, but taxpayer contends that its remaining net income of the taxable years is also deductible under Section 162 (a) of the Code.¹¹ (Br. 32-59.) That section provides as follows:

(a) There shall be allowed as a deduction (in lieu of the deduction for charitable, etc., contributions authorized by section 23 (o)) any part of the gross income, without limitation, which pursuant to the terms of the will or deed creating the trust, is during the taxable year paid or permanently set aside for the purposes and in the manner specified in section 23 (o), or is to be used exclusively for religious, charitable, scientific, literary, or educational purposes, or for the prevention of cruelty to children or animals, or for the establishment, acquisition, maintenance or operation of a public cemetery not operated for profit;

¹¹ The contributions actually paid to charitable organizations during the taxable years (see R. 39, 76-77) were treated by the Commissioner as having been paid from income although they were listed (R. 39, 76) as having been paid from corpus.

The contention that this statute covers the instant trust income of the taxable years is premised simply upon the fact that the trust instrument provides for a remainder gift, at John Danz's death, to such charities as he designates in his will. As the Tax Court held (R. 123-125), Section 162 (a) does not entitle taxpayer to any deduction in addition to the amounts actually paid to charitable organizations during the taxable years.

As taxpayer concedes (Br. 46, 49, 50), the second clause of Section 162 (a), relating to income "to be used exclusively for * * * charitable * * * purposes", adds nothing to the first clause except to make it clear that a deduction is allowed for income held for *direct* charitable use by the estate or trust itself.¹² The first clause is broad enough to cover such a situation, as taxpayer also admits (Br. 49), and we are not in any event concerned here with any such situation. The instant trust instrument did not require, direct or authorize the trust to engage in any functional charitable activity.

The inquiry on this branch of the case, therefore, is simply whether the trust net income of each taxable year not paid to charitable organizations was "during the taxable year * * * permanently set aside" for payment to exempt organizations "pursuant to the terms of the * * * deed creating the trust". Treasury Regulations 111, Section 29.162-1 (Appendix, *infra*). It plainly was not.

First of all, it should be noted that the trustees, who apparently had discretion under the trust instrument

¹² Taxpayer's long explanation (Br. 53-55) of *Estate of Whitehead v. Commissioner*, 3 T.C. 40, affirmed *sub nom. Commissioner v. Citizens & So. Nat. Bank*, 147 F. 2d 977 (C.A. 5th), seems directed primarily to establishing this point.

to do so, did not in fact "permanently set aside" any of the trust income of any taxable year for payment to charitable organizations.¹³ The trust income not actually paid to charitable organizations during the taxable years was obviously used by the trustees, for the trust borrowed money from John Danz and Sterling Theaters, Inc., and in all of the taxable years was indebted on such loans. (R. 115.) In any event, there is nothing in the record to show a permanent setting aside of trust income by the trustees during any taxable year.

Recognizing that the trustees did not in fact "permanently set aside" any part of the trust income during any taxable year, taxpayer relies upon decisions in which it was held that no action on the part of the trustees was required—that the income involved was permanently set aside for charitable purposes by the trust or will itself. (Br. 45.) Those decisions hold that of the trust instrument or decedent's will unequivocally requires the payment of the income involved to certain charitable organizations or if the possibility of payment to others is so remote as to be negligible, such income is "permanently set aside" for charitable purposes by the trust instrument or will itself and a crediting of such income to the charities by the trustees is unnecessary. See *Bowers v. Slocum*, 20 F. 2d 350 (C.A. 2d); *Hopkins v. Commissioner*, 13 T. C. 952; *Slocum v. Commissioner*, 6 B. T. A. 36; *Johnson v. Commissioner*, 13 B. T. A. 850; *McClung v. Commissioner*, 13 B. T. A.

¹³ It appears that income is "permanently set aside" for charitable purposes pursuant to the trust instrument if the trust instrument gives the trustees discretion to permanently set aside income for charitable purposes and they do in fact do so. See *Old Colony Co. v. Commissioner*, 301 U. S. 379.

335; *Welch v. Commissioner*, 9 B. T. A. 1370; *Irving Bank-Columbia Trust Co. v. Commissioner*, 8 B. T. A. 833; *Beggs v. United States*, 27 F. Supp. 599, 607 (C. Cls.). For example, in *Bowers v. Slocum*, *supra*, income received during the course of administration of an estate was held to have been permanently set aside for charitable purposes because the income was a part of the decedent's residuary estate and the decedent's will required payment of the residuary estate to certain charitable organizations.¹⁴

The present case is not one in which the trust instrument itself permanently set aside trust income during

¹⁴ *Commissioner v. Citizens & So. Nat. Bank*, *supra*, which taxpayer relies upon in connection with the *second* clause of Section 162(a), already discussed, and takes more than four pages of its brief to explain (Br. 50-55), was an application of *Bowers v. Slocum*, *supra*. In that case the testator had in 1935 left his entire estate to a corporation to be formed for the purpose of using the income for charitable and educational purposes, both directly and by payments to other organizations, subject to the payment of specified annuities to two individuals and to directions for carrying out settlement contracts which the decedent had entered into with a former wife and with his wife. The will specifically directed that the *income* be used for payment of the specific bequests and for the charitable purposes of the corporation. The corporation was not formed until 1937 and in the meantime the executor used income for the payments of the specified annuities, settlement payments to the decedent's former wife and wife, and for a compromise settlement of a suit by the wife. It was held that the entire income received during the course of administration, except for the annuities payable out of income, was deductible under Section 162(a). That holding was based on conclusions that the corporation to be formed and to receive the decedent's estate was a charitable trust, despite the fact that the property it was to receive was charged with small bequests, and that the income received during the taxable years by the executor and to be paid to the charitable trust (except for the amount of the annuities) was permanently set aside for the corporation by the will even though it was temporarily diverted by the executor to defray corpus charges. In brief, all that the case stands for, so far as pertinent here, is that income which the will *requires* to be paid to a charitable trust is permanently set aside for charitable purposes despite its temporary use by the executor for another purpose, the will being controlling over the action of the executor.

the taxable years. The instrument simply gave John Danz "the right during his lifetime and by his Last Will and Testament, to designate" charitable beneficiaries (R. 28-29) and provided (R. 29):

Trustees shall distribute to the beneficiary or beneficiaries so named such amounts of the corpus and income of Trust A [the instant trust] and at such time or times as shall be specified from time to time by John Danz in writing to Trustees. Upon the death of John Danz any amounts remaining in Trust A shall be distributed to beneficiaries (qualified as hereinafter set forth) as directed by John Danz, either in writing to the Trustees or in his Last Will and Testament. * * *

Thus, the only trust income which the trust instrument required to be paid to charitable organizations was that which John Danz, in his discretion, directed to be paid to charities from time to time (for which deductions have been allowed for the taxable years) and whatever income as such remained at John Danz's death. Up to the time of John Danz's death, the trust funds not directed by him to be paid to charitable organizations could be used by the trustees in carrying on any trade or business, "whether or not speculative and wheresoever located"; for investments in property, "whether or not speculative in character"; to purchase property (R. 25); to rent or repair property of the trust estate; for loans "with or without security"; for investment or speculation, or loans to, any enterprise in which the trustees are personally interested (R. 26); and for advances to the other trusts created by John Danz and his wife (R. 28). The trustees were authorized, "In investing or speculating with trust funds", to combine

funds of the taxpayer trust with funds of the other trusts (R. 26) and in making investments the trustees (R. 26-27)—

shall in no way be limited to investments commonly referred to as legal for trust funds but shall use the funds of the trust estates in such manner as in their sole discretion they shall deem for the best interests of these trusts and the beneficiaries thereof.

Any speculations or investments made by and any business enterprises carried on by trustees on behalf of the trust estates, shall be entirely at the risk of the trust estates and trustees, in the absence of bad faith, shall in no way be personally liable for indebtedness, liabilities or losses incurred therein. This shall apply even though the speculation, investment or enterprise is one in which trustees are personally interested.

Thus, instead of requiring the trust income of any given year to be “permanently set aside” for charitable organizations, the trust instrument authorized its use for other purposes, even speculative in nature. As the Tax Court stated (R. 124), “The income of a particular year used for such purposes might never go to any charity”. Current trust income could be put to various uses of the trust and “never reach any charity as income or principal, for example, it might be lost in the business venture”. (R. 125.) There may conceivably be trust income as such which will be paid to charitable organizations at John Danz’s death, but that will not be because the trust instrument required trust income to be “permanently set aside” during the taxable years, as required for deduction under Section 162 (a).

Deduction under Section 162 (a) is not authorized simply because trust income remaining at the end of a specified time is payable to charitable organizations. The deduction is for income which "is during the taxable year * * * permanently set aside" for charitable purposes and trust income is not "during the taxable year * * * permanently set aside" for charitable purposes if it is subject to some other use or if the trustees have an option as to its use, as this Court held in *Bank of America Nat. T. & Sav. Ass'n v. Commissioner*, 126 F. 2d 48, and in *Maloney v. Glover*, 171 F. 2d 870, certiorari denied, 337 U. S. 917. See, also, *Boston Safe Deposit & T. Co. v. Commissioner*, 66 F. 2d 179 (C.A. 1st), certiorari denied, 290 U.S. 700.

To argue the contrary, as taxpayer does, is to argue that income of the taxable years is deductible under Section 162(a) in any case in which there is a remainder gift to charity. The Supreme Court flatly rejected such a contention in *Merchants Bank v. Commissioner*, 320 U. S. 256, 263, because "of the explicit requirement that the income be permanently set aside". In that case, where the remainders were to certain named charities, deduction under Section 162(a) was denied on the ground that the ultimate destination of the trust income was uncertain because of the possibility of invasion for use of the life beneficiary. See also *Langenbach's Estate v. Commissioner*, 134 F. 2d 590 (C.A. 6th); *Commissioner v. Upjohn's Estate*, 124 F. 2d 73, 76 (C.A. 6th); *Charles P. Moorman Home for Women v. United States*, 42 F. 2d 257 (W.D. Ky.).

Taxpayer may attempt to distinguish the above cases on the ground that they involved situations where there was an option to use, or possibility of use of, trust in-

come for payment to non-charitable *beneficiaries*, whereas in the present case trust income may not be paid to any non-charitable beneficiary. But the specific reason why charity may not receive the trust income is immaterial. So long as the trust income may be lost to charity, it cannot be considered income which "is during the taxable year * * * permanently set aside" for payment to charitable organizations.

Such amounts should be readily susceptible of proof and, as this Court held in *Bank of America Nat. T. & Sav. Ass'n v. Commissioner, supra*, the taxpayer has the burden of proving what part of the trust income of the taxable years will go to charity. Mere speculation is insufficient. *Merchants Bank v. Commissioner, supra*. The fact that it is impossible for taxpayer to sustain that burden of proof shows that no part of the trust income was permanently set aside for charity during the taxable years.

While perhaps not of great significance in the circumstances of this case, no *specific* exempt organization had a right to receive any part of the trust income or corpus, either immediately or ultimately. Cf. *Huesman's Estate v. Commissioner*, 198 F.2d 133 (C.A. 9th). The beneficiaries of the trust were not named in the trust instrument; they were to be such as John Danz designated. Up to the time of his death, when he was to designate exempt organization to take the remaining trust fund, no beneficiary existed which had any interest in the trust fund or right to sue for mismanagement or enforcement of the trust.

Taxpayer attempts to avoid the force of the requirement of Section 162 (a) that the income be "during the taxable year * * * permanently set aside" by arguing

that it is immaterial that the trustees had authority to invest the trust income. (Br. 41-43.) The authorities relied upon are informal rulings which do not even commit the Commissioner to an interpretation of the law (*Helvering v. N. Y. Trust Co.*, 292 U.S. 455) and which involved situations in which taxpayer assumes the power to invest income existed.¹⁵ Assuming that the mere power to invest income pending the distribution thereof to charities required by the trust instrument does not preclude a deduction under Section 162 (a), the instant case is one in which the trust instrument authorized more than mere investment of income set aside for charity. The trust instrument not only authorized repeated changes in the use of the income but specifically authorized use of the income for *speculative* investments and for carrying on active trades and businesses with all their attendant risks. It is frivolous for taxpayer to contend, as it does in effect, that income is "during the taxable year * * * permanently set aside" for payment to charity even though it is subject to risk of loss in the active conduct of any trade or business in which the trustees may choose to venture. Unless the trustees actually do permanently set aside trust income for payment to charity, income will be "permanently set aside" for charity pursuant to the trust instrument only at John Danz's death and then only in the amount remaining. For income to be deductible under Section 162(a), it must be permanently set aside for charity "during the taxable year".

¹⁵ At another point taxpayer states that the power of investment was involved in *Hopkins v. Commissioner*, 13 T.C. 952, in which the Tax Court allowed a deduction under Section 162(a) without any discussion of the use of income in making investments. (Br. 55.) It is a sufficient answer to that decision that the instant decision, with different facts, was also decided by the Tax Court.

There is no merit in taxpayer's argument (Br. 35-40) that its income should be held to be deductible under Section 162 (a) because individuals are allowed a deduction under Section 23 (o) (Appendix, *infra*) for payments to taxpayer. The deduction for trusts under Section 162 (a) is stated to be in lieu of the deduction authorized by Section 23 (o) for individuals and, as a comparison of the two statutes reveals, is not the same as the latter. *Frank Trust of 1931 v. Commissioner*, 145 F. 2d 411, 413 (C.A. 3d). Obviously, Section 162 (a) cannot be interpreted in conjunction with a statute for which it is a substitute. Section 162 (a) must be given effect according to its plain language, as this Court in effect held in *Huesman's Estate v. Commissioner*, *supra*.

Taxpayer is in error in arguing (Br. 58-59) that its construction of Section 162 (a) is confirmed by changes made by the 1950 Act. In line with the amendments made by the 1950 Act with respect to exempt organizations, Congress, by Section 321 (a) and (b) of the 1950 Act (Appendix, *infra*), made Section 162 (a) subject to exceptions contained in a new subsection (g) which, among other things, precluded the deduction under Section 162 (a) of any *business* income of a trust.¹⁶ Taxpayer conceives that to be a recognition that a deduction under Section 162 (a) could be taken for years prior to 1950 even if the income came from the operation of a business. (Br. 58-59.) It was unnecessary for taxpayer to rely upon the 1950 Act for such a con-

¹⁶ In terms the added provisions preclude the deduction of what would be the trust's "unrelated business net income" if it were exempt from tax but, as stated in H. Rep. No. 2319, 81st Cong., 2d Sess., p. 43 (1950-2 Cum. Bull. 380, 413)—

In the case of trusts under section 162, however, no trade or business may be considered "related". * * *

clusion. For years prior to 1950 there is no restriction under Section 162 (a) in respect of the *nature* of trust income. Whether from business or investment, income is deductible if it is "during the taxable year paid or permanently set aside" for payment to charitable organizations. The disallowance by the 1950 Act of any charitable deduction in respect of business income for subsequent years is of no materiality here. Nor is it of any significance that, as taxpayer points out (Br. 59), H. Rep. No. 2319, *supra*, stated that a trust which either "distributes or accumulates" its income for charitable purposes is, for all practical purposes, exempt from income taxes. So far as shown, the instant trust has not accumulated trust income.

III

The Filing of Form 990 Returns Required of Exempt Organizations under Section 54(f) of the Code Did Not Start the Running of the Three-Year Limitations Period Prescribed by Section 275(a) for Assessment of Taxes so as to Bar Collection of the Deficiencies for 1943, 1944 and 1945

Since taxpayer is not exempt from tax under Section 101 (6), it was required by Section 142 (a) of the Code (Appendix, *infra*) to file fiduciary income tax returns for the taxable years on Form 1041. For the years 1943, 1944 and 1945 it filed such returns on July 28, 1947. (R. 84.) The deficiencies for those years were assessed by the Commissioner on October 14, 1949 (R. 85), which was within the three-year limitations period for assessment prescribed by Section 275 (a) of the Code (Appendix, *infra*).¹⁷ Taxpayer contends, however, that the deficiencies for 1943, 1944 and 1945 are barred on the ground that as to those years the three-

¹⁷ Section 275(a) provides that assessment of tax shall be made "within three years after the return was filed".

year limitation period started running on September 18, 1946, when it filed Form 990 information returns required of *exempt* organizations under Section 54 (f) of the Code and Treasury Regulations 111, Section 29.101-1 (Appendix, *infra*). As the Tax Court held (R. 126-128), the contention has no merit.

In the 1950 Act Congress itself specifically provided when, *for prior years*, the filing of a Form 990 information return required by Section 54 (f) shall constitute the filing of a return for the purposes of Section 275 (a). Section 302 (b) of the 1950 Act (Appendix, *infra*) provides:

(b) *Period of Limitations*.—In the case of an organization which would otherwise be exempt under section 101 of the Internal Revenue Code were it not carrying on a trade or business for profit, the filing of the information return required by section 54 (f) of the Internal Revenue Code (relating to returns by tax-exempt organizations) *for any taxable year beginning prior to January 1, 1951*, shall be deemed to be the filing of a return for the purposes of section 275 of the Internal Revenue Code (relating to period of limitation upon assessment and collection). * * * The provisions of this subsection shall not apply to a taxable year of such an organization with respect to which, prior to September 20, 1950, (1) any amount of tax was assessed or paid, or (2) a notice of deficiency under section 272 of the Internal Revenue Code was sent to the taxpayer. (*Italics supplied.*)

Taxpayer's Form 990 returns for the years 1943, 1944 and 1945 are thus *not* to be treated as returns for the purpose of Section 275(a), for two reasons. First, a notice of deficiency for those years was sent to tax-

payer prior to September 20, 1950. Secondly, taxpayer is not an organization which would otherwise be exempt under Section 101 were it not carrying on a trade or business for profit. As we showed in Point I, *supra*, by Section 301 of the 1950 Act Congress made unmistakably clear its understanding and intent that exemption under Section 101 (6) rests upon a *functional charitable activity*. As we also showed previously, no functional charitable activity can even be attributed to taxpayer, through relationship to an exempt organization or otherwise.

Even if Section 302 (b) of the 1950 Act had not been enacted and settled the matter, taxpayer's Form 990 would not have constituted returns for limitations purposes under Section 275 (a), for two reasons. In the first place, the Forms 990 did not, at the time they were filed, constitute "returns" required to be filed by *any* statute. Secondly, they did not contain all the data from which income tax could be computed and assessed.

Section 54 (f) of the Code requires an annual *information* return only of *exempt* organizations. Treasury Regulations 111, Section 29.101-1, provide that every organization claiming exemption, with exceptions not pertinent here, must establish its exemption by furnishing information on a certain questionnaire and submitting certain pertinent documents, and shall also file "a return of information on Form 990 relative to the business of the organization for the last complete year of operation". The Regulations further provide that—

When an organization (other than a mutual insurance company) has established its right to exemption, it need not thereafter make a return of

income or any further showing with respect to its status under the law, unless * * *, except that every organization exempt or claiming exemption under section 101 (5), (6), except * * *, shall file annually returns of information on Form 990 * * *. * * * (Italics supplied.)

Thus an organization is not relieved of filing income tax returns until it establishes its claimed right to exemption. Annual information returns on Form 990 are required only of exempt organizations. If an organization establishes its right to exemption, it is required to file Form 990; if it does not establish its right to exemption, it must continue filing Form 1041. While the Regulations require the premature filing of one Form 990, the form becomes a "return" required by Section 54 (f) only if the organization establishes its right to exemption. When, as here, the Form 990 is not a "return" required to be filed by Section 54 (f), having been filed by an organization which did not establish exemption, it certainly cannot be a substitute for the return required of taxpayer by Section 142 (a) nor a return for the purpose of starting the running of the statute of limitations for assessment of income taxes.¹⁸

¹⁸ That is the reason the "unpublished ruling" to which taxpayer refers (Br. 65) was not applied in taxpayer's case. The unpublished ruling, which of course is without force and effect in any event, was merely an informal memorandum written by an employee of the Bureau of Internal Revenue in which he expressed the opinion that the Commissioner would be justified in treating a Form 990 as a return sufficient to start the running of the statute of limitations for assessment of income taxes *if the forms furnished sufficient data for computation of income tax and depending upon the provisions and circumstances under which the returns were required and upon the basis of the facts involved in each case*. For a time the Bureau treated the Forms 990 as sufficient to start the running of the statute of limitations *when filed by organizations determined by*

It should especially be noted that this is not a case of a taxpayer mistakenly filing a wrong form, but a case in which the taxpayer is seeking to take advantage of its own disregard of the statute and Regulations. Taxpayer had income in 1943, 1944 and 1945 which it was required by Section 142 (a) of the Code to return on Form 1041 unless it claimed and established exempt status. Taxpayer not only did not file such returns but it did not claim or attempt to establish exempt status until September 19, 1946. (R. 83.) Then, instead of filing, along with the information required by the Regulations of a taxpayer claiming exemption, "a" return "of information" on Form 990 "relative to the business of the organization for the last complete year of operation", as required by the Regulation, it filed a Form 990 for all three previous years. Since taxpayer did not even claim exemption during 1943, 1944 and 1945, there is no possible excuse for its failure to file Forms 1041 for those years, as required by Section 142 (a) of the Code. And, moreover, had it claimed exemption beginning in 1943, it would have been required by the Regulations to file only one information Form 990 and that for the year 1942.

At this point, *Commissioner v. Lane-Wells Co.*, 321 U.S. 219, is pertinent. In that case the taxpayer was required by pertinent Treasury Regulations to file two separate returns, an income tax return and a personal holding company tax return, and failed to file the personal holding company return. The Supreme Court

the Commissioner to be exempt, which may or may not have been proper. However, the records of the Bureau disclose *no* case in which a Form 990 was treated as starting the running of the statute of limitations when filed by an organization which never established a tax-exempt status or was denied exemption.

held that the filing of the income tax return did *not* start the running of the statute of limitations as to the personal holding company taxes. Decision was based on a conclusion that the Treasury Regulations requiring two separate returns for the two types of taxes was reasonable and valid. Among other things, the Supreme Court stated (p. 223):

Congress has given discretion to the Commissioner to prescribe by regulation forms of returns and has made it the duty of the taxpayer to comply. * * * The purpose is not alone to get tax information in some form but also to get it with such uniformity, completeness, and arrangement that the physical task of handling and verifying returns may be readily accomplished. * * *

In the present case only the income tax is involved, but the Regulations clearly show (1) that taxpayer was not relieved of filing *income tax* returns unless and until it claimed and established that it was tax-exempt and (2) that the Forms 990 filed by taxpayer were not even "returns" required by Section 54 (f), let alone Section 142 (a).

Even if the Forms 990 filed by taxpayer for 1943, 1944 and 1945 had been "returns" required to be filed by Section 54 (f) or the Regulations, they would not have been sufficient as *income tax* returns to start the running of the statute of limitations under Section 275 (a) for assessment of income taxes. *Germantown Trust Co. v. Commissioner*, 309 U. S. 304, relied upon by taxpayer (Br. 63-64), shows that one type of return may be a substitute for another type of return only when it contains all the data from which the tax can be com-

puted and assessed.¹⁹ Such data must be supplied, not just "in some form", but with "such uniformity, completeness, and arrangement" that the physical task of handling and verifying returns may be readily accomplished. *Commissioner v. Lane-Wells Co., supra*, p. 223. Taxpayer is incorrect in asserting (Br. 64) that its Forms 990 for 1943, 1944 and 1945 "disclosed all the data from which the tax could be computed". Not only were the Forms 990 mere "information" returns "relative to the business of the organization" (Treasury Regulations 111, Section 29.101-1), the filing of which constituted a *denial* of tax liability, but, as the Tax Court stated (R. 127)—

The stipulation includes copies of the returns filed. A comparison of those returns [Form 990] with the fiduciary returns [Form 1041] for those same years filed on July 29, 1947 shows that they do not contain all of the data from which a tax could be computed and assessed. * * * Furthermore, the information was not only not in the form required of taxpayers, but it was not given with such uniformity, completeness, and arrangement as to constitute an adequate return for the purpose of starting the running of the statute of limitations on assessment and collection of the taxes due. *Commissioner v. Lane-Wells Company*, 321 U.S. 219, * * * . * * *

For a comparison of the two types of returns filed for 1943, 1944 and 1945, see Joint Exhibits 2B, 3C, 4D

¹⁹ It should perhaps be noted that in the *Germantown Trust Co.* case, where the question was whether the fiduciary return filed by the taxpayer was sufficient to start the running of the statute of limitations despite the Commissioner's contention that the taxpayer should have filed a corporate return, it was conceded that the taxpayer was a fiduciary as to a certain fund and that the fiduciary return was one which the taxpayer "was bound to file." (P. 308.)

(Forms 990) and 6F, 7G, 8H (Forms 1041), all transmitted to this Court in their original form.

CONCLUSION

The decision of the Tax Court is correct and should be affirmed.

Respectfully submitted,

H. BRIAN HOLLAND,
Assistant Attorney General.

ELLIS N. SLACK,

MELVA M. GRANEY,
*Special Assistants to the
Attorney General.*

MAY, 1953.

APPENDIX

Internal Revenue Code:

SEC. 23. DEDUCTIONS FROM GROSS INCOME.

In computing net income there shall be allowed as deductions:

* * * * *

(o) [as amended by Sec. 224 (a) of the Revenue Act of 1939, c. 247, 53 Stat. 862, and Sec. 127 (c) of the Revenue Act of 1942, c. 619, 56 Stat. 798] *Charitable and Other Contributions*.—In the case of an individual, contributions or gifts payment of which is made within the taxable year to or for the use of:

(1) The United States, any State, Territory, or any political subdivision thereof or the District of Columbia, or any possession of the United States, for exclusively public purposes;

(2) A corporation, trust, or community chest, fund, or foundation, created or organized in the United States or in any possession thereof or under the law of the United States or of any State or Territory or of any possession of the United States, organized and operated exclusively for religious, charitable, scientific, literary, or educational purposes, or for the prevention of cruelty to children or animals, no part of the net earnings of which inures to the benefit of any private shareholder or individual, and no substantial part of the activities of which is carrying on propaganda, or otherwise attempting, to influence legislation;

(3) the special fund for vocational rehabilitation authorized by section 12 of the World War

Veteran's Act, 1924, 43 Stat. 611 (U.S.C., Title 38, § 440) ;

(4) posts or organizations of war veterans, or auxiliary units or societies of any such posts or organizations, if such posts, organizations, units, or societies are organized in the United States or any of its possessions, and if no part of their net earnings inures to the benefit of any private shareholder or individual; or

(5) a domestic fraternal society, order, or association, operating under the lodge system, but only if such contributions or gifts are to be used exclusively for religious, charitable, scientific, literary, or educational purposes, or for the prevention of cruelty to children or animals ;

to an amount which in all the above cases combined does not exceed 15 per centum of the taxpayer's net income as computed without the benefit of this subsection or of subsection (x). Such contributions or gifts shall be allowable as deductions only if verified under rules and regulations prescribed by the Commissioner, with the approval of the Secretary.

For unlimited deduction if contributions and gifts exceed 90 per centum of the net income, see section 120.

* * * * *

(26 U.S.C. 1946 ed., Sec. 23.)

SEC. 54. RECORDS AND SPECIAL RETURNS.

* * * * *

(f) [as added by Sec. 117 (a) of the Revenue Act of 1943, c. 63, 58 Stat. 21] Every organization, except as hereinafter provided, exempt from taxa-

tion under section 101 shall file an annual return, which shall contain or be verified by a written declaration that it is made under the penalties of perjury, stating specifically the items of gross income, receipts, and disbursements, and such other information for the purpose of carrying out the provisions of this chapter as the Commissioner, with the approval of the Secretary, may by regulations prescribe, and shall keep such records, render under oath such statements, make such other returns, and comply with such rules and regulations as the Commissioner, with the approval of the Secretary, may from time to time prescribe. No such annual return need be filed under this subsection by any organization exempt from taxation under the provisions of section 101—

(1) which is a religious organization exempt under section 101 (6) ; or

(2) which is an educational organization exempt under section 101 (6), if such organization normally maintains a regular faculty and curriculum and normally has a regularly organized body of pupils or students in attendance at the place where its educational activities are regularly carried on ; or

(3) which is a charitable organization, or an organization for the prevention of cruelty to children or animals, exempt under section 101 (6), if such organization is supported, in whole or in part, by funds contributed by the United States or any State or political subdivision thereof, or is primarily supported by contributions of the general public ; or

(4) which is an organization exempt under section 101 (6), if such organization is operated, supervised, or controlled by or in connection with

a religious organization described in paragraph (1); or

(5) which is an organization exempt solely under section 101 (3); or

(6) which is an organization exempt under section 101 (15), if such organization is a corporation wholly owned by the United States or any agency or instrumentality thereof, or a wholly owned subsidiary of such a corporation.

(26 U.S.C. 1946 ed., Sec. 54.)

SEC. 101. EXEMPTIONS FROM TAX ON CORPORATIONS.

The following organizations shall be exempt from taxation under this chapter—

* * * * *

(6) Corporations, and any community chest, fund, or foundation, organized and operated exclusively for religious, charitable, scientific, literary, or educational purposes, or for the prevention of cruelty to children or animals, no part of the net earnings of which inures to the benefit of any private shareholder or individual, and no substantial part of the activities of which is carrying on propaganda, or otherwise attempting, to influence legislation;

* * * * *

(14) Corporations organized for the exclusive purpose of holding title to property, collecting income therefrom, and turning over the entire amount thereof, less expenses, to an organization which itself is exempt from the tax imposed by this chapter;

* * * * *

(26 U.S.C. 1946 ed., Sec. 101.)

SEC. 142. FIDUCIARY RETURNS.

(a) [as amended by Sec. 112 (b) of the Revenue Act of 1941, c. 412, 55 Stat. 687, and Sec. 131 (c) (2) of the Revenue Act of 1942, *supra*] *Requirement of Return*.—Every fiduciary (except a receiver appointed by authority of law in possession of part only of the property of an individual) shall make under oath a return for any of the following individuals, estates, or trusts for which he acts, stating specifically the items of gross income thereof and the deductions and credits allowed under this chapter and such other information for the purpose of carrying out the provisions of this chapter as the Commissioner with the approval of the Secretary may by regulations prescribe—

(1) Every individual having a gross income for the taxable year of \$500 or over, if single, or if married and not living with husband or wife;

(2) Every individual having a gross income for the taxable year of \$1,200 or over, if married and living with husband or wife;

(3) Every estate the gross income of which for the taxable year is \$500 or over;

(4) Every trust the net income of which for the taxable year is \$100 or over, or the gross income of which for the taxable year is \$500 or over, regardless of the amount of the net income; and

(5) Every estate or trust of which any beneficiary is a nonresident alien.

* * * * *

SEC. 162. NET INCOME.

The net income of the estate or trust shall be computed in the same manner and on the same basis as in the case of an individual, except that—

(a) There shall be allowed as a deduction (in lieu of the deduction for charitable, etc., contributions authorized by section 23 (o)) any part of the gross income, without limitation, which pursuant to the terms of the will or deed creating the trust, is during the taxable year paid or permanently set aside for the purposes and in the manner specified in section 23 (o), or is to be used exclusively for religious, charitable, scientific, literary, or educational purposes, or for the prevention of cruelty to children or animals, or for the establishment, acquisition, maintenance or operation of a public cemetery not operated for profit;

* * * *

(26 U.S.C. 1946 ed., Sec. 162.)

SEC. 275. PERIOD OF LIMITATION UPON ASSESSMENT AND COLLECTION.

Except as provided in section 276—

(a) *General Rule.*—The amount of income taxes imposed by this chapter shall be assessed within three years after the return was filed, and no proceeding in court without assessment for the collection of such taxes shall be begun after the expiration of such period.

* * * *

(26 U.S.C. 1946 ed., Sec. 275.)

Revenue Act of 1950, c. 994, 64 Stat. 906:

SEC. 301. INCOME OF EDUCATIONAL, CHARITABLE,
AND CERTAIN OTHER EXEMPT ORGANIZATIONS.

(a) *Tax on Certain Types of Income.*—Supplement U of chapter 1 is hereby amended to read as follows:

“SUPPLEMENT U—TAXATION OF BUSINESS INCOME
OF CERTAIN SECTION 101 ORGANIZATIONS

“SEC. 421. IMPOSITION OF TAX.

(a) *In General.*—There shall be levied, collected, and paid for each taxable year beginning after December 31, 1950—

“(1) upon the supplement U net income (as defined in subsection (c)) of every organization described in subsection (b)(1), a normal tax of 25 per centum of the supplement U net income, and a surtax of 20 per centum of the amount of the supplement U net income in excess of \$25,000.

“(2) upon the supplement U net income of every trust described in subsection (b)(2), a normal tax computed at the rate and in the manner provided in section 11 and a surtax computed at the rates and in the manner provided in section 12 (b). In making such computations for the purposes of this section, the term ‘the amount of the net income in excess of the credits against net income provided in section 25’ as used in section 11 shall be read as ‘the amount of the supplement U net income’ and the term ‘surtax net income’ as used in section 12 (b) shall be read as ‘supplement U net income’.

“(b) *Organizations Subject to Tax.*—

“(1) *Organizations taxable as corporations.*—The taxes imposed by subsection (a) (1) shall apply in the case of any organization (other than a church, a convention or association of churches, or a trust described in paragraph (2)) which is exempt, except as provided in this supplement, from taxation under this chapter by reason of paragraph (1), (6), or (7) of section 101. Such taxes shall also apply in the case of a corporation described in section 101 (14) if the income is payable to an organization which itself is subject to the tax imposed by subsection (a) or to a church or to a convention or association of churches.

“(2) *Trusts taxable at individual rates.*—The taxes imposed by subsection (a) (2) shall apply in the case of any trust which is exempt, except as provided in this supplement, from taxation under this chapter by reason of paragraph (6) of section 101 and which, if it were not for such exemption, would be subject to the provisions of supplement E.

“(c) *Definition of Supplement U Net Income.*—The term ‘supplement U net income’ of an organization means the amount by which its unrelated business net income (as defined in section 422) exceeds \$1,000.

* * * * *

“SEC. 422. UNRELATED BUSINESS NET INCOME.

“(a) *Definition.*—The term ‘unrelated business net income’ means the gross income derived by any organization from any unrelated trade or business (as defined in subsection (b)) regularly carried

on by it, less the deductions allowed by section 23 which are directly connected with the carrying on of such trade or business subject to the following exceptions, additions, and limitations:

* * * * *

“(b) *Unrelated Trade or Business.*—The term ‘unrelated trade or business’ means, in the case of any organization subject to the tax imposed by section 421 (a), any trade or business the conduct of which is not substantially related (aside from the need of such organization for income or funds or the use it makes of the profits derived) to the exercise or performance by such organization of its charitable, educational, or other purpose or function constituting the basis for its exemption under section 101, * * *

* * * * *

The term ‘unrelated trade or business’ means, in the case of a trust computing its unrelated business net income under this section for the purposes of section 162 (g)(1), any trade or business regularly carried on by such trust or by a partnership of which it is a member.

* * * * *

(b) *Feeder Organizations.*—Section 101 is hereby amended by adding at the end thereof the following paragraph:

“An organization operated for the primary purpose of carrying on a trade or business for profit shall not be exempt under any paragraph of this section on the ground that all of its profits are payable to one or more organizations exempt under this section from taxation. For the purposes of

this paragraph the term 'trade or business' shall not include the rental by an organization of its real property (including personal property leased with the real property)."

* * * * *

(26 U.S.C. 1946 ed., Supp. IV, Secs. 101, 421-422.)

SEC. 302. EXEMPTION OF CERTAIN ORGANIZATIONS FOR PAST YEARS.

(a) *Trade or Business Not Unrelated.*—For any taxable year beginning prior to January 1, 1951, no organization shall be denied exemption under paragraph (1), (6), or (7) of section 101 of the Internal Revenue Code on the grounds that it is carrying on a trade or business for profit if the income from such trade or business would not be taxable as unrelated business income under the provisions of Supplement U of the Internal Revenue Code, as amended by this Act, or if such trade or business is the rental by such organization of its real property (including personal property leased with the real property.)

(b) *Period Limitations.*—In the case of an organization which would otherwise be exempt under section 101 of the Internal Revenue Code were it not carrying on a trade or business for profit, the filing of the information return required by section 54 (f) of the Internal Revenue Code (relating to returns by tax-exempt organizations) for any taxable year beginning prior to January 1, 1951, shall be deemed to be the filing of a return for the purposes of section 275 of the Internal Revenue Code (relating to period of limitation upon assessment and collection). In the case of such an organization which was, by the provisions of section 54 (f)

of the Internal Revenue Code, specifically not required to file such information return, for the purposes of the preceding sentence a return shall be deemed to have been filed at the time when such return should have been filed had it been so required. The provisions of this subsection shall not apply to a taxable year of such an organization with respect to which, prior to September 20, 1950, (1) any amount of tax was assessed or paid, or (2) a notice of deficiency under section 272 of the Internal Revenue Code was sent to the taxpayer.

* * * * *

SEC. 303. EFFECTIVE DATE OF PART I.

The amendments made by this part shall be applicable only with respect to taxable years beginning after December 31, 1950. The determination as to whether an organization is exempt under section 101 of the Internal Revenue Code from taxation for any taxable year beginning before January 1, 1951, shall be made as if section 301 (b) of this Act had not been enacted and without inferences drawn from the fact that the amendment made by such section is not expressly made applicable with respect to taxable years beginning before January 1, 1951.

SEC. 321. CHARITABLE, ETC., DEDUCTIONS OF TRUSTS.

(a) *Amendment of Section 162.*—Section 162 is hereby amended by adding at the end thereof the following:

“(g) *Rules for Application of Subsection (a) in the Case of Trusts.*—

“(1) *Trade or business income.*—In computing the deduction allowable under subsection (a)

to a trust for any taxable year beginning after December 31, 1950, no amount otherwise allowable under subsection (a) as a deduction shall be allowed as a deduction with respect to income of the taxable year which is allocable to its Supplement U business income for such year. As used in this paragraph the term 'Supplement U business income' means an amount equal to the amount which, if such trusts were exempt under section 101 (6) from taxation, would be computed as its unrelated business net income under section 422 (relating to income derived from certain business activities and from certain leases).

* * * *

“(4) *Accumulated income.*—If the amounts permanently set aside, or to be used exclusively, for the charitable and other purposes described in subsection (a) during the taxable year or any prior taxable year and not actually paid out by the end of the taxable year—

“(A) are unreasonable in amount or duration in order to carry out such purposes of the trust; or

“(B) are used to a substantial degree for purposes other than those described in subsection (a); or

“(C) are invested in such a manner as to jeopardize the interests of the religious, charitable, scientific, etc., beneficiaries,

the amount otherwise allowable under subsection (a) as a deduction shall be limited to the amount actually paid out during the taxable year and shall not exceed 15 per centum of the income of the trust (computed without the benefit of subsection (a)).”

(b) *Technical Amendment*.—Section 162 (a) is hereby amended by striking out “There shall be allowed as a deduction” and inserting in lieu thereof “Subject to the provisions of subsection (g), there shall be allowed as a deduction”.

(26 U.S.C. 1946 ed., Supp. IV, Sec. 162.)

Treasury Regulations 111, promulgated under the Internal Revenue Code:

SEC. 29.101-1. *Proof of Exemption*.—A corporation is not exempt merely because it is not organized and operated for profit. In order to establish its exemption it is necessary that every organization claiming exemption file with the collector for the district in which is located the principal place of business or principal office of the organization an affidavit or a questionnaire as set forth below. An organization claiming exemption under section 101 (1), * * * (6), * * * shall file the form of questionnaire appropriate to its activities, filled out in accordance with the instructions on the form or issued therewith. Copies of the following questionnaire forms may be obtained from any collector: For corporations claiming exemption under section 101 (6), Form 1023 * * *. * * * To each such affidavit or questionnaire shall be attached a copy of the articles of incorporation, declaration of trust, or other instrument of similar import, setting forth the permitted powers or activities of the organization, the by-laws or other code of regulations, and the latest financial statement showing the assets, liabilities, receipts, and disbursements of the organization. An organization claiming exemption under section 101 (5), (6), except organizations organized and operated exclusively for religious purposes, (7), (8), (9), or (14) shall also

file with the other information specified herein a return of information on Form 990 relative to the business of the organization for the last complete year of operation; provided, however, that such return shall not be required of an organization which is organized and operated exclusively for educational purposes, or educational and religious purposes, if no part of its net earnings or assets are distributable to any private shareholder in liquidation or otherwise and if, in the case of an organization privately owned or operated, the Commissioner is advised of any increase in the compensation of its owners, managers, trustees, or directors over the amount of such compensation for the last year for which its exemption under section 101 (6) was approved by the Commissioner. Form 990 will not be required of charitable organizations operated or controlled by religious or educational organizations of the type exempt under the preceding sentence from the requirement of filing such returns, nor of separately conducted charitable organizations meeting the above conditions as to distributions and compensation, nor of charitable organizations operated under the control of a State or any political subdivision thereof.

* * * * *

The collector, upon receipt of the affidavit, or questionnaire, and other papers, will examine them as to completeness and will forward completed documents to the Commissioner for decision as to whether the organization is exempt. In addition to the information specified herein, the Commissioner may require any additional information deemed necessary for a proper determination of whether a particular organization is exempt under section 101, and when deemed advisable in the

interest of an efficient administration of the internal revenue laws he may in the cases of particular types of organizations provide additional questionnaires or otherwise prescribe the form in which the proof of exemption shall be furnished.

When an organization (other than a mutual insurance company) has established its right to exemption, it need not thereafter make a return of income or any further showing with respect to its status under the law, unless it changes the character of its organization or operations or the purpose for which it was originally created, except that every organization exempt or claiming exemption under section 101 (5), (6), except organizations organized and operated exclusively for religious purposes, (7), (8), (9), or (14) shall file annually returns of information on Form 990 with the collector for the district in which is located the principal place of business or principal office of the organization; provided, however, * * *. * * * The return of information on Form 990 shall be filed on or before the 15th day of the fifth month following the close of the taxable year. * * *

* * * * *

An organization which is exempt, under section 101 and the regulations thereunder, from filing returns of income is not, however, relieved from the duty of filing returns of information (see sections 147 and 148).

SEC. 29.101(6)-1. *Religious, Charitable, Scientific, Literary, and Educational Organizations and Community Chests.*—In order to be exempt under section 101(6), the organization must meet three tests:

(1) It must be organized and operated exclusively for one or more of the specified purposes ;

(2) Its net income must not inure in whole or in part to the benefit of private shareholders or individuals ; and

(3) It must not by any substantial part of its activities attempt to influence legislation by propaganda or otherwise.

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Since a corporation to be exempt under section 101(6) must be organized and operated exclusively for one or more of the specified purposes, an organization which has certain religious purposes and which also manufactures and sells articles to the public for profit, is not exempt under section 101(6) even though its property is held in common and its profits do not inure to the benefit of individual members of the organization. See section 101(18) as to religious or apostolic associations or corporations.

A corporation otherwise exempt under section 101(6) does not lose its status as an exempt corporation by receiving income such as rent, dividends, and interest from investments, provided such income is devoted exclusively to one or more of the purposes specified in that section.

SEC. 29.162-1. *Income of Estates and Trusts.*—

* * *

From the gross income of the estate or trust there are also deductible (either in lieu of, or in addition to, the deductions referred to in the preceding paragraph of this section) the following:

(a) Any part of the gross income of the estate or trust for its taxable year which, by the terms

of the will or of the instrument creating the trust, is paid or permanently set aside during such year for the charitable, etc., uses or purposes referred to or described in section 162(a). This deduction is in lieu of that authorized by section 23(o) in the case of individual taxpayers.

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In the
United States Court of Appeals
For the Ninth Circuit

THE JOHN DANZ CHARITABLE TRUST, *Petitioner,*

v.

COMMISSIONER OF INTERNAL REVENUE, *Respondent,*

ON PETITION FOR REVIEW OF DECISION OF THE TAX
COURT OF THE UNITED STATES

REPLY BRIEF FOR THE PETITIONER

F. A. LESOURD,
LITTLE, LESOURD, PALMER & SCOTT,
Attorneys for Petitioner.

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Seattle 4, Washington.

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In the
United States Court of Appeals
For the Ninth Circuit

THE JOHN DANEZ CHARITABLE TRUST,
Petitioner,

Commissioner of Internal Revenue,
Respondent,

Docket
No. 13608

ON PETITION FOR REVIEW OF DECISION OF THE TAX
COURT OF THE UNITED STATES

REPLY BRIEF FOR THE PETITIONER

L

PETITIONER IS EXEMPT UNDER I.R.C. §101(6)

While admitting that the purposes for which Petitioner was organized and operated were charitable (Be. 17-24), and that no part of its fund or income can inure to a private individual (Be. 18, 28), nevertheless Respondent argues that exemption under I.R.C. 101(6) is not available, based on a number of intermingled contentions. To aid in understanding these contentions, it is necessary to separate and analyze them. They include argument that (1) an organization must be engaged in "functional charitable activities" of its own to secure exemption; (2) if an organization has no "functional charitable activities" of its own, it may secure exemption only by "relationship" to some or-

In the
United States Court of Appeals
For the Ninth Circuit

THE JOHN DANZ CHARITABLE TRUST,
Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE,
Respondent,

Docket
No. 13608

ON PETITION FOR REVIEW OF DECISION OF THE TAX
COURT OF THE UNITED STATES

REPLY BRIEF FOR THE PETITIONER

I.

PETITIONER IS EXEMPT UNDER I.R.C. §101(6)

While admitting that the purposes for which Petitioner was organized and operated were charitable (Br. 37-38), and that no part of its fund or income can inure to a private individual (Br. 18, 28), nevertheless Respondent argues that exemption under I.R.C. §101(6) is not available, based on a number of intermingled contentions. To aid in understanding these contentions, it is necessary to separate and analyze them. They include argument that (1) an organization must be engaged in "functional charitable activities" of its own to secure exemption; (2) if an organization has no "functional charitable activities" of its own, it may secure exemption only by "relationship" to some or-

ganization that does carry on such activities; (3) there is no generally accepted destination test for exemption; and (4) receipt of business income destroys exemption, even if there is no primary purpose of operating business enterprise. We deal with each of these arguments separately.

As a preliminary, we wish to refer to Respondent's practice, throughout his brief, of stating that funds were to be paid only to exempt organizations selected by John Danz during his lifetime and by his will (for example, Resp. Br., pp. 2-3, 16, 47, 50), omitting the important provisions that if he fails to specify beneficiaries for the entire corpus and income, then the entire balance will go to exempt beneficiaries selected by designated grandchildren or by the trustees. Where the entire fund has been given irrevocably for charitable purposes, the exemption is not affected by the fact that the donor or members of his family have the power to select the particular charitable beneficiaries. *Harrison v. Barker Annuity Fund*, 90 F.(2d) 286 (C.C.A. 7th); *Schoellkopf v. U. S.*, 124 F.(2d) 982 (C.A. 2d); *Wm. H. Donner*, 40 B.T.A. 80; *Estate of Louise V. Simpson*, 2 T.C. 963; *Eppa Hunton IV*, 1 T.C. 821 (Acq. 1943 C.B. 12); *Cummins-Collins Foundation*, 15 T.C. 613.

A. "Functional Charitable Activities" Not Necessary to Exemption

The contention that an organization must itself be engaged in "functional charitable activities" to be exempt is entirely new on the part of the Commissioner. It was not argued below at any stage, it did not enter into the decision of the Tax Court in this case, and as

far as Petitioner can determine, it was not argued in any of the recent cases involving application of I.R.C. §101(6).

What Respondent means by the phrase "functional charitable activities" is difficult to determine. The phrase is not defined in his brief, it is not to be found in the statute and as far as we know has never been used, and certainly not defined, by any court. Apparently what Respondent has in mind is the actual conduct of some particular exempt activity, like the conduct of classrooms in a school or the conduct of church services, as distinguished from the supplying of money or property to assist another organization in the conduct of these activities.

If this meaning of the phrase "functional charitable activities" is what Respondent intends, then it should be pointed out that Respondent's argument implies that every charitable foundation, trust and corporation in this country that is engaged solely in supplying money to other charitable institutions has no exemption. It would make no difference whether the income of the foundation came from conduct of a business or entirely from Government bonds, the organization would be taxable unless it took over conduct of the classrooms from the colleges it was supporting, or conduct of the services from the churches it was supporting.

One would expect that such a drastic proposal would be found in a general statement by the Treasury Department or Congress rather than simply in a brief filed in a single case in court. The fact is that there have been statements on this subject, by both the Treasury Department and Congress, and these statements are con-

trary to Respondent's contention. Also, the court decisions that have discussed this subject are contrary to such contention.

In 1924, the Income Tax Unit ruled in I.T. 1945 (III-1 C.B. 273) that a corporation which did not actually engage in charitable undertakings itself but distributed its income to exempt institutions was exempt under §231(6) of the 1918 and 1921 Revenue Acts (substantially identical with I.R.C. §101(6) here involved). This ruling has never been revoked and still stands as the announced policy of the Bureau of Internal Revenue on this subject.

This argument of Respondent, including the argument (Br. 28) that I.R.C. §101(14) is the only section offering exemption to an organization created to supply funds and property to charitable organizations, was denied by the Circuit Court of Appeals for the Second Circuit in *Roche's Beach, Inc., v. Comm.*, 96 F.(2d) 776, 778-779, quoting I.T. 1945 above mentioned.

The Seventh Circuit held to the same effect in *Harrison v. Barker Annuity Fund*, 90 F.(2d) 286 (1937). The corporation there involved was required to disburse its income and corpus to charitable organizations and purposes specified from time to time by the donor. The Court held the corporation exempt under I.R.C. §101(6).

In *Willingham v. Home Oil Mill*, 181 F.(2d) 9, the Fifth Circuit followed the same rule. There a trust was created requiring the corpus and income to be paid to exempt institutions. (See District Court decision 68 F. Supp. 525 for the facts). The trust owned the stock

of a corporation which operated a business. The corporate articles required that the corporation be operated for charitable purposes. The Fifth Circuit held the corporation exempt under §101(6) even though it was two steps removed from what the Respondent calls a “functional” charity.

Estate of Louise V. Simpson, 2 T.C. 963, is to the same effect. Quoting from the *Roche’s Beach* opinion and I.T. 1945, the Tax Court stated that it was not necessary to exemption under I.R.C. 1004(a)(2)(B), granting gift tax exemption in substantially the same language as I.R.C. 101(6), that a foundation itself engage in an exempt activity but it was sufficient that it furnished funds or property to other charitable organizations. No appeal was taken from this decision.

In *Eppa Hunton IV*, 1 T.C. 821, a trust was created with an insurance policy as the corpus, giving grantor’s wife the right to designate any exempt organizations relieving poverty as recipients of the income of the trust. The court held that the trust was organized and operated exclusively for charitable purposes. The Commissioner acquiesced. 1943 C.B. 12.

That Congress understood this to be the settled meaning of §101(6) appears from a reading of the committee reports on the Revenue Act of 1950. Since Respondent seems to draw a different meaning from these committee reports (Br. 39-40, 55-56), we have set forth in the appendix to this brief extensive excerpts therefrom. Bearing on the “functional activities” theory of Respondent, attention is particularly called to the statements concerning “feeder organizations” in the House

and Senate Reports (App. *infra*, pp. 22). If Congress had felt that all feeder organizations were not or should not be exempt, it would have so expressed itself.

In making clear that the denial of exemption by the 1950 Act to organizations whose primary purpose is to conduct trade or business should apply only prospectively, the committee reports (App., *infra*, p. 21) discuss pending litigation as to the exemption for past years (*i.e.*, *C. F. Mueller Co.*, and like cases). This discussion in the committee reports is stated to be with regard to "such feeder organizations" and the "area covered by this amendment," both phrases referring back to the language concerning primary purpose of operating a business and indicating the committee's belief that the litigation and consequent uncertainty as to the rule for past years was confined to cases where the primary purpose of the organization was to operate a business.

The cases cited by Respondent in support of a "functional requirement" (Br. 28) do not so hold. *U. S. v. Community Services*, 189 F.(2d) 421 (C.A. 4th), held that a primary purpose to engage in commercial enterprise was a non-charitable activity.

In *Bear Gulch Water Co. v. Commissioner*, 116 F. (2d) 975 (C.A. 9th), this Court held that a private business corporation organized for profit was not exempt, even after its stock was acquired by an exempt institution, where there was nothing in its own charter requiring its profits to go to exempt purposes. *Universal Oil Products Co. v. Campbell*, 181 F.(2d) 451 (C.A. 7th); *Gagne v. Hanover Water Works Co.*, 92 F.(2d) 659 (C.C.A. 1st); *Sun-Herald Corp. v. Duggan*, 160 F.

(2d) 475 (C.A. 2d), all involved the same situation as the *Bear Gulch* case.

Actually, if some "functional charitable activity" were necessary to exemption, Petitioner would still qualify. One of its functions was the furnishing of buildings, rent free, for the use of the Humanist Society of Washington, and the Humanist Society of San Francisco, both being "functional" exempt educational organizations. (R. 116). As the Tax Court said in *Estate of Louise V. Simpson*, 2 T.C. 963, 965, where the foundation rented its property to a school at cost:

* * * An organization that acquires facilities and rents them at cost or furnishes them free of charge to a school is furthering education, in our view, as well as the agency that supervises the course of instruction.

B. Required Use of Funds for Exempt Organizations Is Only "Relationship" Necessary to Exemption

Recognizing that exemption has been accorded to organizations even though not conducting so-called "functional charitable activities," Respondent argues that in the absence of such activity there must be some "relationship" by which a "functional charitable activity" may be attributed to the trust. (Br. 25-31).

The word "relationship," like the phrase "functional charitable activity," is not to be found in the statute and is not defined, as far as we can find, in any decision or in Respondent's brief. From Respondent's argument, we gain the impression that the "relationship" he speaks of is a parent and subsidiary relationship of such a nature that the subsidiary can be treated as the *alter ego* of the parent.

Respondent admits that *C. F. Mueller Co. v. Comm.*, 190 F.(2d) 120 (C.A. 3d) and *Sico Co. v. U. S.*, 102 F. Supp. 197 (Ct. Cls.) are contrary to his argument. *Willingham v. Home Oil Mill*, 181 F.(2d) 9 (C.A. 5th) (Certiorari denied, 340 U.S. 852), is also contrary to his argument, even though Respondent seeks to distinguish it. While the Home Oil Mill corporation was wholly owned by a charitable trust, that trust was not itself engaged in so-called "functional charitable activities" but in turn supplied funds to a number of other exempt organizations. Furthermore, a previous District Court case, *Home Oil Mill v. Willingham*, 68 F. Supp. 525 (D. Ct. Ala.), cited with approval and followed by the Fifth Circuit, held that the exemption of Home Oil Mill was based on its own charter which specified that all property was held to produce income to be turned over to exempt institutions, using the language of §101(6) in describing those institutions just as was done in the case at bar, but leaving the particular institutions to be chosen from time to time by the directors of the corporation.

Also contrary to Respondent's argument are *Cummins-Collins Foundation*, 15 T.C. 613, where the board of directors (principally consisting of the grantors) had power to pay income or corpus from time to time to any charitable organization, and *William H. Donner*, 40 B.T.A. 80, where the beneficiaries were set forth in the language of I.R.C. §101(6) and the grantor had the power to designate the particular organizations as in the case at bar.

I.R.C. §101(6) speaks of "purposes" not "relationships." In no case that we have found has it been held

that a "relationship" as proposed by Respondent is necessary. On the contrary, the above cited decisions show that exemption exists as long as the income and corpus must be used to benefit exempt organizations.

I.R.C. §422(b) (added by §301(a) of the Revenue Act of 1950) uses the word "unrelated" in defining the Supplement U income of exempt organizations to be taxed after 1950. This section recognizes that use of income for exempt institutions is a "a relationship" since it expressly excludes it from the "relationships" which will be recognized in computing Supplement U income.

C. Destination Test of Exemption Has Been Generally Accepted

Respondent contests the accuracy of the statement made by this Court in *Squire v. Students Book Corp.*, 191 F.(2d) 1018, 1020, that most of the circuits have applied the "ultimate destination" test. (Br. 19). Nevertheless, we submit that this Court was correct in this statement. The decisions enunciating and following this test are as follows:

1. Supreme Court of the United States:

Trinidad v. Sagrada Orden, 263 U.S. 578, where the court stated:

* * * Two matters apparent on the face of the clause go far towards settling its meaning. First, it recognizes that a corporation may be organized and operated exclusively for religious, charitable, scientific, or educational purposes, and yet have a net income. Next, it says nothing about the source of the income, but makes the destination the ultimate test of exemption.

2. Second Circuit:

Roche's Beach, Inc., v. Comm., 96 F.(2d) 776;
Debs Memorial Radio Fund v. Comm., 148 F.
 (2d) 948.

That the Second Circuit is consistently recognizing the destination test is shown by the statement in the recent case of *Consumer-Farmer Milk Coop. v. Comm.*, 186 F.(2d) 68, 70:

It is true that a claim to exemption under section 101(8) is not barred merely because profit is derived from commercial operations provided the ultimate destination of the profit is charitable. * * *

3. Fifth Circuit:

Willingham v. Home Oil Mill, 181 F.(2d) 9 (Certiorari denied, 340 U. S. 852).

The recent case of *Mabee Petroleum Corp. v. U. S.*, decided April 17, 1953, recognizes this rule but holds the corporation taxable because it diverted funds to its founder.

4. Third Circuit:

C. F. Mueller Co. v. Comm., 190 F.(2d) 120.

5. Sixth Circuit:

Comm. v. Orton, 173 F.(2d) 483.

6. Court of Claims:

Sico Co. v. U. S., 102 F. Supp. 197.

The only Circuit Court case rejecting the destination test is *U. S. v. Community Services, Inc.*, 189 F.(2d) 421 (C.A. 4th).

Respondent contends that destination of income should not be the *sole* test of exemption. (Br. 20). Of course, it is not the *sole* test of exemption. If the organization is operated for the purpose of enhancing private

gain, even though none of the actual income or corpus of the organization will go to private parties, it is not exempt. *Better Business Bureau v. U. S.*, 326 U.S. 279; *Smyth v. California State Automobile Ass'n.*, 175 F. (2d) 752 (C.A. 9th); *Universal Oil Products Co. v. Campbell*, 181 F.(2d) 451 (C.A. 7th). Moreover, if the organization was created as a private business corporation for private profit, it is not exempt simply because its stock is acquired by an exempt organization since the statute requires that it be both *organized* and *operated* for exempt purposes. *Bear Gulch Water Co. v. Comm.*, 116 F.(2d) 975 (C.A. 9th) (Certiorari denied, 314 U. S. 652); *Gagne v. Hanover Water Works Co.*, 92 F.(2d) 659 (C.A. 1st); *Universal Oil Products Co. v. Campbell, supra*; *Sun-Herald Corp. v. Duggan*, 73 F. (2d) 298 and 160 F.(2d) 475 (C.A. 2d). Some of the cases cited by Respondent on this point involved situations where the funds were actually used for private gain and thus would not qualify under the destination test itself. *Mabee Petroleum Corp. v. U. S.*, decided by C.A. 5th, April 17, 1953; *Stanford University Book Store v. Helvering*, 83 F.(2d) 710 (C. A. D. C.). See also *Consumer-Farmer Milk Coop. v. Comm.*, 186 F.(2d) 68 (C.A. 2d).

Where, however, the organization was created in such a manner as to exclude private gain and where it is also operated in that manner, the ultimate destination test, as this Court stated, has been applied by most of the circuits dealing with the problem.

D. Business Income Does Not Prevent Exemption

No contention is made by Respondent that Petitioner was organized and operated for the primary purpose of

engaging in a trade or business for profit. While Respondent does contend that Petitioner's primary purpose was to make money for contribution to exempt organizations (Br. 38), Respondent does not argue that such a purpose (which is consistent with ordinary trust investment) makes § 101(6) unavailable. Respondent does argue, however, that the receipt of any business income unrelated to a "functional charitable activity" defeats exemption. (Br. 38-46).

Insofar as this argument implies the necessity of a "functional charitable activity", we have previously discussed it. Insofar as it implies that an otherwise exempt organization loses that exemption whenever it happens to have business income, the argument is contrary to the decisions and to the intention of Congress.

We have discussed this subject at some length in discussing *U. S. v. Community Services, Inc.*, 189 F.(2d) 421 (C. A. 4th) at pp. 22-32 of our opening brief. In addition, we call the Court's attention to the fact that exemption was granted in the following cases where business income was received which had relationship to charitable activities only in that the income was required to be used to support those activities:

Roche's Beach, Inc. v. Comm., 96 F.(2d) 776 (C.A. 2d);

Willingham v. Home Oil Mill, 181 F.(2d) 9 (C.A. 5th) Certiorari denied, 340 U. S. 852;

C. F. Mueller Co. v. Comm., 190 F.(2d) 120 (C.A. 3d);

Sico Co. v. U. S., 102 F. Supp. 197 (Ct. Cls.).

Respondent appears to gather a different conclusion

from ours as to the meaning of the legislative history of the Revenue Act of 1950 on this question. He cites § 302(a) of the 1950 Act as intended to deny exemption for past years if any "unrelated" income is received, even though he admits that receipt of "unrelated" income for future years will not deprive the organization of exemption unless there was a primary purpose of operating a business enterprise. (Br. 39-40).

The committee reports on the 1950 Act (App. *infra*) make it clear that the purpose of that Act was to tighten the exemption for future years, not to liberalize it. In view of this over-all purpose, it would appear unlikely that Congress by the 1950 Act was granting exemption after that date where it did not exist before. The committee reports show that Congress believed organizations otherwise under § 101(6) to be exempt even though they received profits from a trade or business. Thus in Part III of the House Report, the committee states that the bill is designed to correct problems which have arisen in connection with "tax-exempt organizations", and that the provisions in Title III of the bill deal with the unrelated business income of certain "tax-exempt institutions". (App., *infra*, p. 21). See also quotations on pp. 30-31 of our opening brief. The Senate Bill is to the same effect. (App., *infra*, p. 25). It was only in cases where the operation of a business was the primary purpose of an organization that Congress indicated that there was litigation and uncertainty. (App. *infra*, p. 24).

Sec. 302(a) by its language is a protection of exemption for past years in certain instances. It is not a denial of exemption. It was designed to make certain, despite

pending litigation, that an organization having as its primary purpose the operation of a business would not be deprived of exemption if that business were related to the exempt activities of the organization.

As early as 1945, thirty nine percent of all the charitable and educational institutions which filed information returns listed business income as part of their total receipts. 35 Virginia L. Rev. 1001. If Congress in 1950 had intended retroactively to remove exemption from the very large number of charitable organizations involved, it would have done so by direct language, not by indirection.

Re-enactment of § 101(6) repeatedly without change does not support Respondent's argument as claimed (Br. 45), but the contrary, particularly in view of the fact that the judicial construction of this section, exempting organizations conducting business, was in 1942 specifically called to the attention of Congress and no change in the section was made. *C. F. Mueller Co. v. Comm.*, 190 F.(2d) 120 (C.A. 3d) ; *Willingham v. Home Oil Mill*, 181 F.(2d) 9 (C.A. 5th) ; Hearings before the House Ways and Means Committee on the Revenue Act of 1942, Vol. 1, p. 89.

II.

Petitioner Is Entitled to Deduction of Its Income Under I.R.C. §162(a)

Respondent's admission (Br. 55-56) that deduction under § 162(a) prior to 1950 was not affected by the nature of the income (i.e., whether from business or investment or whether "related" or "unrelated"), and his further admission (Br. 56) that Congress interprets

§ 162(a) as meaning that a trust accumulating any income for charitable purposes was prior to 1950 not taxable thereon, narrows the inquiry under § 162(a) to whether petitioner has accumulated income for charitable purposes as contemplated by the two clauses of that section.

The denial that petitioner has accumulated any trust income (Resp. Br., p. 56) is not well taken. The findings show the net income of the trust, the distributions made, which were less than the income, and the resulting increase in net worth. R. 115, 116. The balance sheets set out in Joint Ex. 14N to the Stipulation of Facts, adopted by the findings, shows the corresponding increase in assets and reduction of liabilities. While a small part of the accumulation of income was represented by a reduction of liabilities, rather than by new investment assets (Joint Ex. 14N), nevertheless the reduction of liabilities gives that much greater equity in the trust assets held for charity and constitutes an accumulation under § 162(a). *Comm. v. Citizens and Southern National Bank*, 147 F.(2d) 977 (C.C.A. 5th). (See quotation on p. 54 of our opening brief.)

Petitioner, then, accumulated income for what Respondent admits (Br. 37-38) is a charitable purpose. Under the interpretation of § 162(a) by Congress (Pet. Opening Br., p. 59) this is sufficient to support the deduction. (See also Senate and Conference Reports on 1950 re accumulated income, App. *infra*, p. 22). Nevertheless, Respondent argues against the deduction by treating the second clause of § 162(a) as if it had no application to use of funds to support charitable activities of other organizations and by contending that there

is no permanent setting aside of the income under the first clause of § 162(a) because no specific organization was named in the trust instrument as a beneficiary and because trustees might lose the income in speculative investments.

As to the second clause of § 162(a), our opening brief (pp. 46-56) demonstrates that it covers use of income for charitable purposes through other organizations as well as directly by the trust. Many of the oldest and largest foundations in the country have power to and do use their income both directly and through other organizations. No matter which method is eventually employed as to a particular dollar of income, that dollar is still "used exclusively for * * * charitable * * * purposes" under the second clause of § 162(a).

Concerning the first clause of § 162(a), Respondent does not deny that the decisions hold that it is the provisions of the trust instrument, not the actions of the trustees, that constitutes the "permanent setting aside". (Br. 48-49). No case is cited by Respondent holding that to secure a deduction for income permanently set aside, the trust deed must name the specific organizations which will receive the fund. All of the cases relied on by Respondent in this argument involved provisions in the will or trust deed for payments to private parties leaving it uncertain whether the income was held for private or charitable purposes. See *Bank of America Nat. T & Sav. Ass'n. v. Comm.*, 126 F.(2d) 48; *Maloney v. Glover*, 171 F.(2d) 870, certiorari denied, 337 U. S. 917; *Boston Safe Deposit & T. Co. v. Comm.*, 66 F.(2d) 179 (C. A. 1st), certiorari denied, 290 U. S. 700; *Merchants Bank v. Comm.*, 320 U. S. 256, 263; *Langenbach's Estate v. Comm.*, 134 F.(2d) 590 (C.A.

6th); *Charles P. Moorman Home for Women v. U. S.*, 42 F.(2d) 257 (W.D. Ky.); *Huesman's Estate v. Comm.*, 198 F.(2d) 133 (C.A. 9th).

The contention that a named beneficiary is necessary is contrary to *Comm. v. Upjohn's Estate, supra*. Deduction under § 162(a) was there allowed even though the will specified no definite beneficiary, leaving it to the trustees to select them, and forbidding the trustees from making any distributions for ten years. Also opposed to Respondent's argument is *Boggs v. U. S.*, 27 F. Supp. 599 (Ct. Cls.). There the will left the estate for the benefit of such charities as the executor and decedent's sister should determine. No specific organization was named as a beneficiary. Deduction of the income was allowed under §219(b)(1) of the Revenue Act of 1926, the predecessor of I.R.C. §162(a). The Court of Claims said:

As such income was received it was by the terms of the will permanently set aside and destined for charitable uses. Such income was clearly deductible.

To the same effect see *Wm. T. Bruckner, et al., Trustees*, 20 B.T.A. 419.

Examination of the governing instruments of the nation's largest foundations, as collected in Chambers, *Charters of Philanthropies* (1948), indicates that most of them specify no particular beneficiary, but leave the charitable beneficiaries to be selected in the future by designated parties, often including the donor. Certainly it has not generally been understood that § 162(a) was restricted in its application to foundations where some particular beneficiary is named.

No income was lost to charity by Petitioner's investments; to the contrary, the fund which is held for charity was substantially enhanced. Nevertheless, Respond-

ent argues that the power to make speculative investments deprives Petitioner of the deduction under § 162(a) because investments might in the future be unsuccessful.

Many, if not most, modern instruments creating charitable foundations give unlimited investment powers. See, for example, instruments set forth in Chambers, *Charters of Philanthropies* (1948). In a period of inflation the actual value of the fund may be threatened, rather than safeguarded, by too narrow an investment policy. There is risk in all investments, no matter what their nature.

Nothing in the language of § 162(a) forbids investment of the accumulated income held for charitable purposes, nor controls the type of investment. In almost every case where a deduction under § 162(a) is allowed, the accumulated income has been invested in some manner and stands some risk of loss due to bad judgment of the trustees. In no case that we know of has this risk been thought to make § 162(a) inapplicable.

The general understanding has been to the contrary. "Provided the eventual use of the money is described with clear certainty, it makes no difference that it is lost in unsuccessful investments or that the trustee may dissipate it." B. C. Eaton in 35 *Virginia L. Rev.* p. 850, discussing deduction under § 162(a).

Petitioner's investment policy, as pointed out in our opening brief (p. 25), has been in traditional types of charitable foundation assets. There is no basis to the contention that the earnings of Petitioner were not permanently set aside for charitable purposes simply because the trust instrument gave the trustees broad

powers to meet any investment situation that might arise. The practical necessity of broad powers is demonstrated by the present case where Petitioner's trustees were required to operate the Savoy Hotel for a period of time because of inability to find a suitable tenant.

III.

Returns on Form 990 Commenced Statute of Limitations

Sec. 302(b) of the Revenue Act of 1950 is cited by Respondent as prescribing that the returns of Petitioner on Form 990 do not start the statute of limitations. No such statement is to be found in that section, which simply made certain that the Commissioner would initiate no new proceedings in which he took the position that Form 990 was not sufficient to commence the statute. It left the pending cases, including that at bar, to be determined by the courts on the basis of existing law and said nothing one way or the other as to that question.

Respondent argues that Petitioner's returns on Form 990 were not income tax returns under the statute because Form 990 was a return to be filed only by exempt organizations and Petitioner has never established its right to exemption to the satisfaction of the Commissioner. However, I.R.C. § 101(6) does not make the exemption therein granted depend upon the determination of the Commissioner. If an organization complies with the requirements of § 101(6) it is exempt, irrespective of whether it has applied to the Commissioner for, or whether the Commissioner has granted exemption. *Saving Feature of Relief Dept. of B. & O. R. R.*, 32 B.T.A. 295 (Acq. XIV-1 C.B. 18). The regulations

themselves recognized that an organization claiming exemption should file Form 990 returns for periods prior to the filing of an exemption application. Regs. 111, § 29.101-2 (as added by T.D. 5381, June 26, 1944) stated¹:

* * * For proof and establishment of right to exemption from tax which must accompany Form 990 (Revised May 1944) in the case of an organization which has not established its right to such exemption prior to the filing of the annual return, see subsections (a) and (b) of this section.

Petitioner's trustees, therefore, acted in accordance with the law and regulations in filing income tax returns on Form 990 for the years here involved.

With regard to the contention that the returns on Form 990 did not supply the data on which the tax could be computed, we refer the court to Joint Exs. 2B, 3C and 4D. While all the figures are not identical with the later returns for the same years on Forms 1041 (Joint Exs. 6F, 7G and 8H), this is because the Form 990 returns contain items like "contributions received" that would not enter into Form 1041, and also because of correction of errors discovered prior to the filing of the 1041 returns.

CONCLUSION

The Tax Court should be reversed and directed to find that there are no deficiencies in income tax due from Petitioner.

Respectfully submitted,

F. A. LESOURD,

Attorney for Petitioner.

Dated: May 25, 1953.

¹ Regs. 111, § 29.101-1, set out in the appendix to Respondent's brief (pp. 76-78), relates only to periods prior to January 1, 1943, none of which are here involved.

APPENDIX

**Excerpts from Legislative History of Revenue Act
of 1950**

H. Rep. No. 2319, 81st Cong., 2d Sess. (1950—2 C.B.
pp. 408-471) :

III. Sources of Additional Revenue.

(E) *Educational, Charitable, and Similar Tax
Exempt Organizations.*

Your committee's bill includes a series of amendments designed to correct certain problems which have arisen in connection with tax-exempt organizations. The provisions contained in title III of the bill deal with the unrelated business income of certain tax-exempt institutions, the so-called lease-back problem, the problem of accumulated investment income, and certain restrictions on the exemptions enjoyed by privately controlled trusts and foundations and on the deductions allowed to donors with respect to their gifts to such organizations.

(1) *Unrelated Business Income.*

Your committee's bill imposes the regular corporate income tax on certain tax-exempt organizations which are in the nature of corporations and the individual income tax on tax-exempt trusts with respect to so much of their income as arises from active business enterprises which are unrelated to the exempt purposes of the organizations.

* * *

The problem at which the tax on unrelated business income is directed here is primarily that of unfair competition. The tax-free status of these section 101 organizations enables them to use their profits tax-free to expand operations, while their

competitors can expand only with the profits remaining after taxes. * * *

Your committee's bill does not deny the exemption where the organizations are carrying on unrelated active business enterprises, or require that they dispose of such businesses, but merely imposes the same tax on income derived therefrom as is borne by their competitors.

* * *

(4) *Feeder Organizations.*

Section 301(b) of your committee's bill provides that no organization operated primarily for the purpose of carrying on a trade or business (other than the rental of real estate) for profit shall be exempted under section 101 merely on the grounds that all of its profits are payable to one or more organizations exempt from tax under this section.

* * *

(G) *Charitable Deductions by Trusts.*

Your committee has found that virtually the same problems exist with respect to the charitable, etc., income tax deduction taken by trusts under section 162(a) of the code as exist with respect to the charitable, etc., organizations which are exempt from income tax under section 101(6) of the code. Section 162(a) permits a trust which is taxable under Supplement E of the code to deduct any amount of its otherwise taxable income which, pursuant to the terms of the will or deed creating the trust, is "paid or permanently set aside" for charitable, etc., purposes. Thus, a trust which either distributes or accumulates its income for charitable purposes is, for all practical purposes, exempt from income taxes.

* * *

In order to correct this situation, your committee's bill provides limitations on the present section 162(a) deduction which are similar to the limitations the bill provides with respect to the section 101(6) income tax exemption. The section 162(a) deduction is made inapplicable to trade or business income, which is to be computed on the same basis as the unrelated business net income of exempt organizations.

Detailed Discussion of the Technical Provisions of the Bill:

TITLE III. *Treatment of Income of, and Gifts and Bequests to, Certain Tax-Exempt Organizations.*

Part I.—Taxation of Business and Other Income of Certain Tax-Exempt Organizations.

Subsection (a) of section 301 of the bill adds to the Internal Revenue Code certain provisions imposing a tax on the unrelated business net income of educational, charitable, etc., organizations and on the accumulated investment income of certain exempt organizations. * * *

Section 421. Imposition of Tax.

Subsection (a) of section 421 imposes a tax upon the Supplement U net income (as defined in subsection (c)) of certain organizations now exempt from Federal income tax by reason of sections 101(1), (6), (7), and 14) of the Internal Revenue Code. This tax is effective for taxable years beginning after December 31, 1950.

* * *

Section 301(b). Feeder Organizations.

Subsection (b) of section 301 of the bill adds a paragraph at the end of section 101 of the code to

provide that an organization operated for the primary purpose of carrying on a trade or business for profit is not to be exempt under any paragraph of section 101 of the code on the ground that all of its profits are payable to one or more organizations exempt from taxation under that section. It is also provided that for the purposes of this paragraph the term "trade or business" does not include the rental by an organization of its real property (including personal property leased therewith).

The determination of the tax treatment of such feeder organizations for taxable years beginning prior to January 1, 1951, is to be made as if this subsection of the bill had not been enacted and without inference drawn from the fact that the amendment made by this subsection of the bill is not expressly made applicable to such taxable years. In the area covered by this amendment there has been litigation as to the application of such a rule under existing law (cf. *Roche's Beach, Inc., v. Commissioner* (C.C.A. 2, 1938), 96 F.(2d) 776; *Universal Oil Products Co. v. Campbell* (C.A. 7, 1950), 181 F.(2d) 451; *Willingham v. Home Oil Mill* (C.A. 5, 1950), 181 F.(2d) 9; *C. F. Mueller Co.*, 14 T.C. No. 111½ May 25, 1950). The amendment is intended to show clearly what, from its effective date, the rule is to be, without disturbing the determination in present litigation of the rule of existing law.

* * *

The paragraph applies to organizations operated for the primary purpose of carrying on a trade or business for profit, as for example, a feeder corporation whose business is the manufacture of

automobiles for the ultimate profit of an educational institution.

* * *

Section 302. Effective Date of Part I.

Section 302 of the bill provides that the amendments made by part I of title III of the bill (the Supplement U tax rules so far discussed) are to be applicable only with respect to taxable years beginning after December 31, 1950.

S. Rep. No. 2375, 81st Cong., 2d Sess. (1950—2 C.B. pp. 483-568):

VIII. Educational, Charitable, and Certain Other Tax-Exempt Organizations, Foundations, and Trusts.

(1) Income from an Unrelated Trade or Business Other Than the Rental of Property.

The problem at which the tax on unrelated business income is directed is primarily that of unfair competition. The tax-free status of section 101 organizations enables them to use their profits tax-free to expand operations, while their competitors can expand only with the profits remaining after taxes. * * *

In neither the House bill nor your committee's bill does this provision deny the exemption where the organizations are carrying on unrelated active business enterprises, nor require that they dispose of such businesses. Both provisions merely impose the same tax on income derived from an unrelated trade or business as is borne by their competitors. In fact it is not intended that the tax imposed on unrelated business income will have any effect on the tax-exempt status of any organization. An organization which is exempt prior to the enactment

of this bill, if continuing the same activities, would still be exempt after this bill becomes law. In a similar manner any reasons for denying exemption prior to enactment of this bill would continue to justify denial of exemption after the bill's passage.

* * *

(B) *Publicizing Instead of Taxing Accumulated Investment Income.*

The House bill would subject to tax, with specified exceptions, that part of the investment income of certain section 101(6) organizations which is not paid out on or before the 15th day of the third month following the close of the taxable year in which the income is received. * * * The House bill would also, with certain exceptions, deny trusts the charitable, etc., deduction under section 162(a) if they do not distribute the income reserved for charitable, etc., purposes within 2½ months after the end of their taxable years. * * *

Your committee has rejected this accumulations tax and substituted for it the requirement that information disclosing the extent of accumulations must be made available to the public. * * * To mention some problems under the House provision:

(1) A foundation could not use any of its income to endow another organization unless the latter was of a type not subject to the accumulations tax.

(2) A foundation could not set aside funds which, if subsequently matched by another organization, would be spent for some specific purpose.

(3) Foundations may find that as the result of a crisis, such as a war, they are unable to spend their funds for a period of time for the purposes for which they were organized.

(4) Funds irrevocably set aside in a 5-year trust

fund as provided by the House bill may not be needed at the end of the 5-year period for the specific project for which they were set aside, and

(5) One year's earnings, the accumulations permitted by the House bill, may not be sufficient to even out variations in the earnings or needs for funds of a foundation.

It is believed that publishing information about the accumulations of these foundations and trusts will serve two purposes. First, full public information will encourage distributions. Second, it will reveal the extent of the accumulations problem.

* * *

(C) "*Feder*" Organizations.

The House bill provides that no organization operated primarily for the purpose of carrying on a trade or business (other than the rental of real estate) for profit shall be exempt under section 101 merely on the grounds that all of its profits are payable to one or more organizations exempt from tax under this section. Your committee has accepted this provision of the House bill.

H. Conf. Rep. No. 3124, 81st Cong. 2d Sess. (1950--2 C.B. pp. 590, 591).

* * *

Amendment No. 151: This amendment strikes out provisions of the House bill which would have added sections 424 and 425 to the Internal Revenue Code, which would have subjected to the Supplement U tax certain accumulated investment income of trusts and certain other organizations exempt under section 101(6) of the Code. The House recedes.

* * *

Amendment No. 159: This amendment eliminates those provisions of the House bill which would have denied a deduction under section 162(a) of the Internal Revenue Code with respect to income which was accumulated, and also the privilege of election which would have been granted trustees to deduct under section 162(a) for certain distributions made after the close of the taxable year. This amendment retains, with modifications, the limitations proposed in the House bill on the unlimited charitable deduction allowed trusts under section 162(a) of the Code. These provisions appeared in section 162(g) (2) and (4), as added to the Code by section 321 of the bill as passed by the House. These limitations, which now appear as section 162(g) (1) and (2), result in the denial of a deduction under section 162(a) of the Code for amounts attributable to income derived from business activities of the trust and for amounts in excess of 15 per cent of the net income if the trust has engaged in certain prohibited transactions, directly or indirectly with the creator of, or a substantial donor to, such trust.

* * *

The House recedes with clerical amendments and an amendment which adds paragraph (4) to section 162(g), which paragraph provides that the amount which would otherwise be allowed under section 162(a) as a deduction for amounts permanently set aside for charitable and related purposes during the taxable year or any prior taxable year and not actually paid out at the end of the taxable year shall be limited to such amounts as actually paid out as are not in excess of 15 per cent of the net income of the trust, computed without the benefit of section 162(a), where the accumula-

tions are (1) unreasonable either in size or duration, or (2) used to a substantial degree for other than charitable or related purposes, or (3) invested in such a manner as to jeopardize the interests of the religious, charitable, scientific, etc., beneficiaries. The deductions are to be so limited as provided in this paragraph in the year in which the accumulation becomes unreasonable or is misused and will continue to be so limited until such situation is corrected.

United States Court of Appeals
For the Ninth Circuit

THE JOHN DANZ CHARITABLE TRUST, *Petitioner*,
vs.
COMMISSIONER OF INTERNAL REVENUE, *Respondent*.

ON PETITION FOR REVIEW OF DECISION OF THE TAX
COURT OF THE UNITED STATES

PETITION FOR REHEARING

F. A. LESOURD,
LITTLE, LESOURD, PALMER,
SCOTT & SLEMMONS,
Attorneys for Petitioner.

15th Floor, Hoge Building,
Seattle 4, Washington.

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United States Court of Appeals
For the Ninth Circuit

THE JOHN DANZ CHARITABLE TRUST, *Petitioner*,

VS.

COMMISSIONER OF INTERNAL REVENUE, *Respondent*.

ON PETITION FOR REVIEW OF DECISION OF THE TAX
COURT OF THE UNITED STATES

PETITION FOR REHEARING

F. A. LESOURD,
LITTLE, LESOURD, PALMER,
SCOTT & SLEMMONS,
Attorneys for Petitioner.

15th Floor, Hoge Building,
Seattle 4, Washington.

United States Court of Appeals
For the Ninth Circuit

THE JOHN DANZ CHARITABLE TRUST,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

Docket
No. 13608

ON PETITION FOR REVIEW OF DECISION OF THE TAX
COURT OF THE UNITED STATES

PETITION FOR REHEARING

*To the Honorable Walter L. Pope and James Alger
Fee, Circuit Judges, and the Honorable Chase A.
Clark, District Judge:*

Comes now Petitioner, by and through its attorneys,
and petitions this Court for a rehearing in the above
entitled case for the following reasons:

The majority opinion in this case denies deduction
under Internal Revenue Code (1939) Section 162(a),
as to income earned but not actually paid to charitable
beneficiaries during the year, on the grounds:

(1) That there must be a named beneficiary pointed
out with precision before it can be said that income
has been "permanently set aside" under the first
clause of Section 162(a), and

(2) That to obtain deduction under the second clause
of Section 162(a) for income "to be used exclusively"

for charitable purposes, payment must be made within the taxable year, and

(3) That where the trust instrument permits use of the income in business or speculation, particularly where the investment may be made in conjunction with investment of private funds, the fact that all corpus and income of the trust must at some future date be paid to charitable organizations is not sufficient to bring it within the second clause of Section 162(a) pertaining to income which is to be used exclusively for charitable purposes.

This is the first time, as far as we can find, that any court has held that there must be a named beneficiary before deduction may be allowed under Section 162(a) for income which is to be accumulated. None of the statutes, regulations or rulings relating to this matter have ever so indicated. Moreover, the decisions in *Comm. v. Upjohn's Estate*, 124 F.(2d) 73 (C.C.A. 6); *Schoellkopf v. U. S.*, 124 F.(2d) 982 (C.C.A. 2); *Beggs v. U. S.*, 27 F.Supp. 599 (Ct. Cls.), and *Arthur Jordan Foundation v. Comm.*, 210 F.(2d) 885 (C.A. 7) are directly in conflict.

While this case involves the Internal Revenue Code provisions existing in the years 1943-1947, it is clear that the principles of law announced in the opinion are just as applicable today. The principles announced are based on a construction of the language of the two clauses of Section 162(a). These remained unchanged until the Internal Revenue Code of 1954 and they have been carried into the 1954 Code as Section 642(c) with no change of substance. If the language used in Section 162(a) of the 1939 Code meant what the majority opin-

ion here announces, then the language now in effect as Section 642(c) of the 1954 Code means the same thing.

Under the principles announced in this case a charitable trust whose precise beneficiaries are to be designated in the future may not secure deduction under Section 162(a) of the 1939 Code or Section 642(c) of the 1954 Code except for amounts actually paid out during the year. The majority opinion appears to so hold irrespective of whether the investment powers extend to business and speculative investments. Where the trustees have power to engage in business or other speculative investments it is clear that this result follows from the majority opinion. Nor does the opinion make this result dependent on any exercise of speculative investment powers by the trustees. The denial of deduction is said to follow as a matter of law from the fact that precise beneficiaries have not been designated, and, assuming that the opinion intends any further qualification, from the mere existence of speculative investment powers.

This construction of the statute limits deduction, on the basis of the language of these two clauses themselves, far beyond the limitations accomplished by the additional subsection 162(g), added by Section 321 of the Revenue Act of 1950 (64 Stat. 906, 954) and carried forward as Section 681 of the Internal Revenue Code of 1954 (68 A Stat. 232). Yet this new subsection (g) was the result of extensive hearings as to what the law should be in this respect and was adopted by Congress to limit after 1950 the deduction previously granted in situations where business income was received, where private benefit might be received, where

retention of income beyond the year earned was unreasonable, or where investments jeopardized the charitable purposes.

Subsection (1) of this subsection (g) denies deduction after 1950 of certain income actually received from business enterprises. Even in situations where it is applicable it permits deduction of the other income of the trust. The majority opinion here, however, totally denies deduction of *any* income, whether from government bonds or any other investments, and irrespective of whether the trust actually has received business income, if the trust instrument gives the trustees power to make business or speculative investments. If the majority opinion is correct, then this provision of subsection (g) adopted by Congress was useless.

Subsection (4) of this subsection (g) provides that after 1950 if income permanently set aside or to be used exclusively for charitable purposes is unreasonable in amount or duration in order to carry out the purposes of the trust, the deduction shall be limited to the amounts actually paid out. There is no suggestion in subsection (g) that this statute deals only with situations where a named beneficiary has been designated for all of the income and, as is well known, a large proportion of charitable trusts have provision for future designation of beneficiaries. The wording of subsection (g) (4) indicates that Congress understood that a trust could get deduction, under both clauses of Section 162(a), for income not paid out during the year, and that Congress intended to deny such deduction after 1950 only where the accumulation was unreasonable. Yet the majority opinion here holds that where

named beneficiaries have not been designated no deduction is permissible for *any* accumulated income.

Moreover, the wording of subsection (g)(4) indicates Congress' understanding that the language of Section 162(a) permitted deduction of accumulated income under the "is to be used exclusively" provisions of the second clause. The majority opinion here holds that the "is to be used exclusively" language relates only to amounts paid out within the taxable year and does not apply to accumulations.

Subsection (g)(4) also limits deduction after 1950 to amounts actually paid out if the funds are invested in such a manner as to jeopardize the interests of the charitable beneficiaries. It is the *actual* investment in such manner, not the *mere possibility* of such an investment, that will defeat deduction. The investments of Petitioner here did not jeopardize the interests of the beneficiaries. All investments were in accepted and traditional charitable trust assets of improved real estate and blue chip stocks except for \$3,889.75 put into the candy shops, an amount only six-tenths of one per cent of the total investments made during the years involved. All investments were, moreover, highly successful. Yet the majority opinion here denies deduction because under their power to make speculative investments the trustees *might* in the *future* so invest the money as to have losses. Again this goes far beyond the limitations which Congress saw fit to adopt when considering this exact question.

The majority opinion cites as one reason for denying deduction the power of the trustees to make investments jointly with other trusts, stating: "But, appar-

ently, the profits of operations were to be turned over to The John Danz Charitable Trust, 'Trust A,' and to the six private trusts pro rata according as the funds of each were used in the particular business or speculation.' This seems to assume that joint investments were made and further seems to assume that the joint investments were made and controlled by some other entity. The fact is, as the Tax Court found (R. 117), that no joint investments were made. Title to all of the assets of the Charitable Trust was taken in the name of the trustees of this trust and the receipts, income, funds, property and disbursements of the Charitable Trust have been separately and fully accounted for (R. 91, 112).

In light of these facts, the majority opinion must be taken as laying down the rule that the mere existence of a power to make joint investments, particularly of a speculative character, is reason for denying to a charitable trust the right to deduct income derived, not from any joint investments but from its wholly-owned and, except for a *de minimis* amount, non-speculative investments. The only reason that we could conceive for such a rule would be fear that through future joint investments some diversion or private benefit might result. Yet Congress, when considering what would be desirable limitations on deductions under Section 162 (a), adopted no such provision, and, even where substantial private benefit had actually occurred by reason of transactions with the donor, simply limited the deduction to 15% of net income (Subsection (2)(B) of Section 162(g) *supra*). No diversion has occurred here whether through joint investments or through any

other means, and, in fact, no diversion could occur from joint investments even if they were made, because under ordinary legal principles governing trusts the trustees would be required to keep careful record and accounting and would not be permitted by any court to confuse or commingle the funds. The opinion in this case in this respect, also, limits deduction on the basis of construction of the language of Section 162(a) itself far beyond the limitations imposed by Congress by separate enactment after prolonged consideration.

The instant decision will create substantial confusion in the drafting of charitable trust instruments. In the face of this decision, no careful lawyer could advise his client that if a charitable trust were drawn to permit accumulation of income and future designation of beneficiaries, tax deduction would be permitted. Nor could he advise in favor of including in a charitable trust agreement powers to invest in business or other speculative investments, even where the 1950 act would pose no problem. Nor could he include the provision (usual in modern trust instruments, particularly where a corporate trustee is named) permitting investment in common trust funds, for fear of losing tax deduction. He would have to advise his client that the carefully considered legislation enacted by Congress in 1950 no longer stated the applicable limitations on tax deduction by charitable trusts.

Most substantial charitable trusts are drawn to last for long periods of time during which conditions may change so drastically as to make inadvisable the precise naming of beneficiaries at the outset and to make dangerous a too narrow limit on investment powers. In

periods of inflation the capital value of the fund is more likely to be lost through too conservative an investment policy than through well considered business investments even though speculative in character. The danger of narrow powers is demonstrated in this case by the necessity imposed on the trustees to operate the Savoy Hotel for a period of time because of inability to find a suitable tenant. Any draftsman of a charitable trust agreement hereafter will be faced with a most difficult dilemma, in the face of the instant decision, in deciding what is and what is not a speculative investment power under this decision and in determining how he can give the trust adequate power to meet future emergencies or inflation and still comply with this decision.

The future establishment of the ordinary charitable trust or foundation as we have known it in this country, *i.e.*, a trust where the trustees or others are to designate beneficiaries in the future and income not used for current charitable payments is to be accumulated will be rendered hazardous from a tax standpoint if the opinion of this Court stands that a trust cannot deduct accumulated income unless beneficiaries for all principal and income have been designated with precision. The taxability of the income of the thousands of trusts of this type already created will be thrown into confusion. We urge that before finally enunciating, in conflict with several previous Circuit Court decisions, principles which will produce such results and which will nullify many provisions for charitable trusts adopted by Congress in 1950 after prolonged hearings

and debate, this Court should give most serious and careful consideration to the problem.

We respectfully ask that a rehearing be ordered in this case.

Respectfully submitted,

F. A. LeSourd,

LITTLE, LeSourd, PALMER,

SCOTT & SLEMMONS,

Attorneys for Petitioner.

15th Floor, Hoge Building,

Seattle 4, Washington.

Date: November 16, 1955.

CERTIFICATE OF COUNSEL

The undersigned, F. A. LeSourd, attorney for Petitioner in this cause, does hereby certify that he prepared the foregoing petition for rehearing; that in his judgment it is well founded and that it is not interposed for delay.

F. A. LeSourd

Subscribed and sworn to before me this 17th day of November, 1955.

M. E. DAVIES

Notary Public in and for
the State of Washington
residing in Seattle.

No. 13,673

IN THE

United States Court of Appeals
For the Ninth Circuit

INTERNATIONAL LONGSHOREMEN'S &
WAREHOUSEMEN'S UNION (CIO), and
INTERNATIONAL LONGSHOREMEN'S &
WAREHOUSEMEN'S UNION, LOCAL 8,
Appellants,

VS.

HAWAIIAN PINEAPPLE COMPANY, LTD.,
a corporation,
Appellee.

HAWAIIAN PINEAPPLE COMPANY, LTD.,
a corporation,
Appellant,

VS.

MARTIN E. ADEN, et al.,
Appellees.

Appeals from the United States District Court
for the District of Oregon.

FILED APPELLANTS' OPENING BRIEF.

JUL 31 1953
JUL P. O'BRIEN
CLERK

GLADSTEIN, ANDERSEN & LEONARD,
NORMAN A. LEONARD,
240 Montgomery Street San Francisco 4, California.
Attorneys for Appellants.

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No. 13,673

IN THE

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INTERNATIONAL LONGSHOREMEN'S &
WAREHOUSEMEN'S UNION (CIO), and
INTERNATIONAL LONGSHOREMEN'S &
WAREHOUSEMEN'S UNION, LOCAL 8,
Appellants,

vs.

HAWAIIAN PINEAPPLE COMPANY, LTD.,
a corporation,
Appellee.

HAWAIIAN PINEAPPLE COMPANY, LTD.,
a corporation,
Appellant,

vs.

MARTIN E. ADEN, et al.,
Appellees.

Appeals from the United States District Court
for the District of Oregon.

APPELLANTS' OPENING BRIEF.

JURISDICTIONAL STATEMENT.

This is an appeal from a final judgment in favor of plaintiff-appellee, Hawaiian Pineapple Company,

Ltd., a corporation (hereinafter referred to as Pineapple) and from an order denying a motion for verdict in accordance with motion for directed verdict or in the alternative for a new trial (hereinafter referred to as the motion for a new trial) made on behalf of defendant-appellants International Longshoremen's and Warehousemen's Union (hereinafter referred to as International) and International Longshoremen's and Warehousemen's Union, Local 8 (hereinafter referred to as Local 8). (TR 177, 146.)¹

The proceeding was commenced by Pineapple against the International and Local 8 and several score individual defendants by a complaint alleging that the cause of action arose under §303 of the Labor Management Relations Act of 1947, Act of June 23, 1947, c. 120, §303, 61 Stat. 158, 29 U.S.C.A. §187). (TR 1.) After defendants below had filed motions to dismiss, to strike, and to make more certain (TR 14-14d), as well as answers (TR 14d-29), the trial Court granted Pineapple leave to file an amended complaint. (TR 30.) The amended complaint in one count alleged jurisdiction on the grounds of diversity of citizenship (TR 31) and in two other counts alleged jurisdiction on the grounds of §303 of the Labor Management Relations Act of 1947, *supra*. (TR 44-45.) In all three counts Pineapple generally alleged a conspiracy on the part of the defendants to injure the plaintiff's business by preventing the unloading of

¹There is also presently before this Court an appeal by Pineapple from that portion of the final judgment which was rendered in favor of individual defendants-appellees and from an order denying Pineapple's motion for a partial new trial. (TR 178-179.)

a cargo of pineapple shipped from the Hawaiian Islands to the United States.

The motions and answers originally filed were deemed directed to the amended complaint. (TR 201-203.) At a pre-trial conference the Court refused to rule upon the legal questions presented by the various motions (TR 203, 291), because "the pleadings are going to pass out of this case". (TR 188.) A motion to sever this case from assault and battery cases brought by two employees of Pineapple was denied. (TR 226-227, 307, 318.) A pre-trial order was drawn up embodying the contentions of the parties and the issues to be litigated. (TR 50-76.)

After trial, the jury returned a verdict in favor of the two employees and against the individual defendants there involved. The claims of these individuals have been settled and no appeal affecting them is now before this Court. The jury also returned a verdict in favor of the individual defendants-appellees and against Pineapple. But the jury found for Pineapple and against the International and Local 8, and assessed damages in the sum of \$201,274.42. (TR 136.) Judgments in accordance with this verdict, i.e., one in favor of the individual defendant-appellees (TR 137-139) and one in favor of Pineapple in the amount specified (TR 140-141) were duly entered.

The motion for a new trial on behalf of the International and Local 8 (TR 146) was denied (TR 148), as was Pineapple's motion for a partial new trial. (TR 142).

In its opinion denying the motions for a new trial, the Court below held that the complaint stated a cause of action “under the Federal Labor Management Relations Act * * * [and] * * * under the common law”. (*Curto v. International Longshoremen’s & W. Union*, 107 F. Supp. 805, 809.)² (TR 155.)

Appellants do not concede that the complaint stated a cause of action or that the trial Court had jurisdiction thereof.

Jurisdiction of this Court over this appeal is conferred by 28 U.S.C.A. §§1291 and 1294(1).

STATUTES INVOLVED.

Section 303 of the Labor Management Relations Act of 1947, *supra*, upon which Pineapple allegedly bases its cause of action, reads in relevant part as follows:

“(a) It shall be unlawful, for the purposes of this section only, in an industry or activity affecting commerce, for any labor organization to engage in, or to induce or encourage the employees of any employer to engage in, a strike or a concerted refusal in the course of their employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services, where an object thereof is—

²The above-cited case is the report of the trial Court’s opinion on the post-trial motions. It is captioned as it is because, as indicated, there were also involved below the cases of two individual employees of Pineapple who claimed to have been injured in a melee occurring during the alleged boycott.

“(1) forcing or requiring * * * any employer or other person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person;

* * * * *

“(4) forcing or requiring any employer to assign particular work to employees in a particular labor organization or in a particular trade, craft, or class rather than to employees in another labor organization or in another trade, craft, or class unless such employer is failing to conform to an order or certification of the National Labor Relations Board determining the bargaining representative for employees performing such work. Nothing contained in this subsection shall be construed to make unlawful a refusal by any person to enter upon the premises of any employer (other than his own employer), if the employees of such employer are engaged in a strike ratified or approved by a representative of such employees whom such employer is required to recognize under subchapter II of this chapter.³

“(b) Whoever shall be injured in his business or property by reason of any violation of subsection (a) of this section may sue therefor in any district court of the United States subject to the limitations and provisions of section 301 of this title without respect to the amount in controversy, or in any other court having jurisdiction of the

³It is not clear to appellants whether Pineapple relies upon subsection 4, *supra*, although some claim was made below that that section had relevance. The Court did not instruct on that subsection, however. It is included here only in the event that Pineapple should assert it is applicable.

parties, and shall recover the damages by him sustained and the cost of the suit."

STATEMENT OF THE CASE.

In the summer of 1948 there occurred an extended strike of longshoremen in the Hawaiian Islands, the chief protagonists being, on the one side, International's Local 136 (not a party to this proceeding), and on the other, the largest of the Hawaiian employers, popularly known as "The Big Five". The strike represented the culmination of many years of industrial turmoil in the Islands and was the result of an effort of the Hawaiian working people to free themselves from the literally substandard conditions under which they had theretofore had to live and work. (TR 537.)⁴ The employers adopted an arrogant, intransigent attitude in the course of the strike and rejected all offers to settle by either direct negotiation or arbitration. (TR 540 ff.; Ex. 23.)

⁴Q. Did he [Meehan] tell you that over the years those five corporations, which dominated the economic life of the Hawaiian Islands, had paid to workers in Hawaii wages at a starvation level? Did he tell you that? A. He did, sir.

Q. Did he tell you that his union and its locals in Hawaii, particularly the Hawaiian Local No. 163, had organized those workers who were receiving those starvation wages, and were endeavoring to raise the standard of living of those people? Did he tell you that? A. Yes, he did.

Q. And did he tell you that the Hawaiian Pineapple Company was controlled and dominated by those five large corporations? Did he tell you that?

A. Yes, I believe he did. It was quite a complete summary, sir." (TR 537.)

Pineapple, which had close economic ties with the Big Five (TR 1073-74, 1166-78), knew that it would be difficult if not impossible to transport cargo from the Islands to the United States by the methods it normally used. (TR 1018, 1289.) Despite this fact and the further fact that Pineapple's contracts with its customers in the United States contained clauses which relieved it from liability for failure to deliver in the event of strike conditions (TR 958-9, 1161, 1292), Pineapple proceeded to assemble cargo in the Islands to be shipped to the United States.

Pineapple, through a wholly owned subsidiary (TR 50), chartered a tug to transport a barge-load of pineapple to the United States. Although the pineapple was allegedly destined for the company's packing plant in San Jose, California, the cargo was shipped not to the Bay Area but to the Pacific Northwest. (TR 540, 1289.) Although the Port of The Dalles was not a port at which ocean-going vessels ever called or which had ever discharged trans-Pacific cargo (TR 544), Pineapple directed its barge to that port for the purpose of having it unloaded there. Prior to the arrival of the barge at the Port of The Dalles, the Port Commissioners agreed to unload the barge, although the port had no facilities for unloading the barge, had no employees, no hiring facilities (TR 545), and in effect had nothing but a dock at which the barge could tie up and a railroad spur from which the cargo could then be transported.

About a hundred miles west of the Port of The Dalles was the metropolitan city of Portland, with

tremendous wharfage and dock facilities and thousands of skilled longshoremen (members of Local 8) who made their living and supported themselves and their families by loading and discharging cargo. For the Port of The Dalles, which was a small port that handled an occasional load of wheat, to attempt to undertake under non-union conditions the discharging of a carload of trans-oceanic cargo represented an obvious threat to the economic well-being of the Portland longshoremen.

Therefore, when it became known in the City of Portland that the Port of The Dalles was undertaking longshore operations without consulting with the union and apparently was about to employ farmhands to perform this work at sub-union wages, a good many of the Portland longshoremen traveled from Portland to The Dalles to investigate the situation. (TR 1239, 1263, 1365.) They were in the city for two or three successive days late in September, 1948, after the barge arrived there and it is true that on the second or third day that they were there, a riot erupted on the dock as a result of which considerable physical damage was done to the dock property and some to the property of Pineapple.

One of the witnesses called by Pineapple—an assistant chief of police (TR 592)—described what happened as follows:

“Q. Would you tell the jury just what happened—I want you to describe the beginning of this invasion of the dock.

* * * * *

A. Well, as I stated before, two flatbed trucks had come in——

Mr. Krause. Q. I don't want you to repeat that. I want you to tell us something about the manner in which it was accomplished, the rapidity with which it was done, and anything else you can tell us about the attitude of the men.

A. Well, it just flared up in a moment. It just flared up like that and was over within just a very few minutes.

Q. The entire riot, you mean?

A. The entire riot, yes." (TR 608-609.)

* * * * *

"Q. And then somebody said, 'Come on, you sons-of-bitches. Are you going to let them break our strike?' or words to that effect?

A. Yes, sir.

Q. And that was, as you said a moment ago, completely spontaneous, wasn't it?

A. Yes, sir.

Q. In other words, just as though somebody had thrown a match into a can of gasoline and it went up in smoke?

A. Just about that fast." (TR 632-633.)

Thereafter injunction proceedings were brought in the State Courts and after protracted litigation and negotiations, at the conclusion of which the Port paid union wages (TR 488), the barge was finally unloaded and the cargo transported to San Jose.

It is appellants' contention here that despite the evidence of violence,⁵ the judgments cannot stand because of serious errors of law which occurred below.

⁵"The fact that physical violence was threatened should not be allowed to confuse the picture." (Staley J., in *United States v.*

SPECIFICATIONS OF ERRORS.

1. The trial Court erred in giving certain instructions and in refusing to give other instructions dealing with questions of agency which arose during the course of the trial as follows:

A. The trial Court erred in instructing the jury as follows:

“The evidence shows that during the time covered by the controversy Louis Goldblatt was an officer and Matt Meehan, William Gettings, Henry Schmidt and Howard Bodine were agents and representatives of the Defendant International, and that Robert Baker and Wilfred Mackey were officers, and that Toby Christiansen and Matt Meehan were agents and representatives of Defendant Local 8.” (TR 1432.)

An exception to this instruction was duly noted. (TR 1462.)

B. The trial Court erred in failing to instruct the jury as requested by appellants as follows:

“The jury may find the existence of an agency in the absence of prior authorization only where the jury finds from subsequent acts assent and ratification by the principal of the conduct of

Kemble, 198 F.2d 889, at 899, wherein a conviction against a union for an alleged violation of the Hobbs Act [18 U.S.C. (1940 ed.) 420d; 18 U.S.C.A. 1951] was reversed.)

See also *NLRB v. International Rice Mill Co.*, 341 U.S. 665, 672 (“In the instant case the violence on the picket line is not material”), and *International Union Etc. v. Wisconsin Employment Relations Board*, 336 U.S. 245, 253 (“While the * * * Board is empowered to forbid a strike because its purpose * * * is illegal, it has been given no power to forbid one because its method is illegal—even if the illegality were to consist of actual or threatened violence to persons or destruction of property”).

the agent. However, in order to find such assent and ratification, the jury must find an adoption of the agency by the principal with a full knowledge of its nature and character and with an intent to adopt it at all events and under all circumstances. Unless the jury so finds, it cannot find that subsequent conduct amounted to a ratification. In other words, if you find that by its conduct after September 28, 1949, the International Longshoremen's and Warehousemen's Union ratified and adopted the acts complained of at The Dalles on that day, you may find the International Longshoremen's and Warehousemen's Union responsible for the results thereof. But, if you find that the action of the International Longshoremen's and Warehousemen's Union after September 28, 1949, was not with an intention to ratify or adopt such acts, but was prompted by humane motives and out of a desire to help the individuals who were then in trouble, I instruct you that such action does not constitute a ratification by the International Longshoremen's and Warehousemen's Union and you cannot find the International Longshoremen's and Warehousemen's Union responsible for the acts at The Dalles because of such subsequent action." (Defendants' Proposed Instruction No. 7, TR 1483-1484.)

"I further instruct you that if you find that it was the defendant herein, Matt Meehan, who was acting solely and only as the agent of Local No. 8, then I instruct you that you may not hold the International Union liable for any act or any statement made or any act or thing done by said

defendant, Matt Meehan.” (Defendants’ Proposed Instruction No. 28, TR 1485-1486.)

“I further instruct you that with respect to the doctrine of agency, a person may be an employee or agent of one person or organization, and nevertheless may do something in the interests of another person or organization. It is perfectly consistent with the law, and the rules of agency, that in acting for other persons he has a perfect right so to do without committing his actual employer or principal to any liability or responsibility. In other words, in this case, while Mr. Meehan was an employee of the International Union it is perfectly consistent with the rules of agency and employment for him to have done acts and things for any other organization as that organization’s sole agent and without binding the International or rendering the International Union responsible therefor.” (Defendants’ Proposed Instruction No. 33, TR 1487-1488.)

“I further instruct you that in relation to this matter of agency, that it is probably contended by the plaintiff, Hawaiian Pineapple Company, that Matt Meehan was the agent of the International Union. I therefore instruct you, that any principal at any time may alter, change or limit the extent of an agent’s power and authority to bind the principal—as for instance, a principal may limit an agent’s authority in the commercial field to buy with no power to sell; or a principal may limit an agent’s authority to sell and have no authority to buy. So, in this case, the International Union at any time had the full

and complete right, ability, authority and power to limit the authority of Matt Meehan even though Mr. Meehan remained on the payroll of the International Union. In other words, during the entire period of time with which we are here concerned, the International had the power and authority to limit Mr. Meehan to representing local unions in local situations. And, if you find, from all of the circumstances in this case, from a reasonable interpretation of the facts, that it was the purpose and intention of the International and they did any and all things necessary to exercise their intention, to so limit the authority of Mr. Meehan, that during this period of time he was not to represent the International, then I instruct you that nothing Mr. Meehan did during that period of time could bind the International Union." (Defendants' Proposed Instruction No. 37, TR 1488-1489.)

"I further instruct you, that if you find in this local situation in which Local No. 8 was involved that Mr. Meehan's authority was limited to represent Local No. 8 only, then you may not hold the International liable for anything said or done by Mr. Meehan." (Defendants' Proposed Instruction No. 38, TR 1489.)

Exceptions to the failure to give the foregoing instructions was duly noted. (TR 1451, 1452, 1454.)

2. The trial Court erred in failing adequately to instruct the jury on the doctrine of minimization of damages, its total instruction on the subject being as follows:

“In this case, if you do award damages, you must remember that it is the duty of plaintiff to minimize the damages as far as reasonably possible. Therefore, if you find that plaintiff is entitled to recover damages but that it could have reasonably, in the exercise of due diligence and fair business practices, have minimized the amount thereof by taking any measures suggested in the evidence, you are entitled to consider that factor in assessing damages.” (TR 1441-1442.)

An exception to the inadequacy of this instruction was duly noted. (TR 1457.)

3. The trial Court erred in failing to instruct the jury as requested by the following proposed instructions that the expression of views or opinion was protected activity even under the provisions of the Labor Management Relations Act of 1947 and could not be the basis of liability.

“I further instruct you, ladies and gentlemen, with respect to any alleged boycott in this case, that it was not against any law of the United States, including the Taft-Hartley law, for the longshoremen to talk to the truck drivers employed by the Hawaiian Pineapple Company and advise them of the fact, either (a) that the pineapple was ‘hot’, as that phrase is understood in this proceeding; or (b) that the Port of The Dalles was threatening the working conditions and wages of the Portland longshoremen.” (Defendants’ Proposed Instruction No. 45, TR 1490.)

“I further instruct you, that it was not a violation of the section of the Taft-Hartley Law under

which plaintiffs are suing, for the defendants, or any of them, to speak to the truck drivers or other employees of the Hawaiian Pineapple Company, even if you find that such speech amounted to an inducement or encouragement to those employees to cease working for the Hawaiian Pineapple Company.” (Defendants’ Proposed Instruction No. 46, TR 1490-1491.)

“I instruct you, that under the provisions of the Taft-Hartley Law, the expressing of any views, argument or opinion or the dissemination thereof, whether in written, printed, graphic or visual form, shall not constitute or be considered by you to be evidence of a violation of the law, if such expression contains no threat, or reprisal, or force, or promise of benefit. (29 USCA, 158(c).)” (Defendants’ Proposed Instruction No. 47, TR 1491.)

An exception to the failure to give these instructions was duly noted. (TR 1455.)

4. The trial Court erred in giving certain instructions, and in refusing to give other instructions, dealing with questions of liability under the Labor Management Relations Act of 1947 as follows.

A. The trial Court erred in instructing the jury on the elements of liability under said Act as follows:

“If the Plaintiff Hawaiian Pineapple Company, Ltd., has established by a preponderance of the evidence that the International, by and through its officers and agents, and Local 8, and Local 8 itself, through its officers, agents and members, or either the International or Local 8, induced or

encouraged the employes of Plaintiff Hawaiian Pineapple Company, Ltd., to engage in a concerted refusal in the course of their employment to transport, handle or work on the cargo of pineapple in commerce, or to perform any services in connection therewith at The Dalles, Oregon, with the object of forcing or requiring Plaintiff Hawaiian Pineapple Company to cease doing business with the Union Pacific Railroad, one of the various trucking companies whose names I gave you a few minutes ago, the Goodat Crane Company, or any of them, or with its customers in the State of California, to whom the cargo was to be shipped, or any of them, and it is further established that as a direct and proximate result thereof plaintiff sustained damage to its business and property, plaintiff would be entitled to recover as against the defendant union or defendant unions doing the acts with the intent described.

“Similarly, if plaintiff has established by a preponderance of the evidence that the International, by and through its officers and agents and Local 8, and Local 8 itself, through its officers, agents and members, or either the International or Local 8 induced or encouraged the employes of either the Goodat Crane Company, the Portland-Pendleton Motor Transport Company, Consolidated Freightways, Oregon-California-Nevada Fast Freight, or any other trucking lines doing interstate business from The Dalles, Oregon, to engage in a concerted refusal in the course of their employment to refuse to transport, handle, work on or perform any services in connection with plaintiff’s cargo or with the object of forcing or requiring either

Goodat Crane Service or any of the trucking lines, or both, to cease doing business with the plaintiff, and you further find that as a direct and proximate result thereof plaintiff sustained damage to its business and property, plaintiff would be entitled to recover.” (Tr. 1424-1426.)

Exceptions to these instructions were duly noted. (TR 1454-1455, 1457.)

B. The trial Court erred in instructing the jury on the elements of liability under said Act as follows:

“You may consider whether or not the conversations which were held by certain individuals of the longshoremen with the truck drivers employed by the Hawaiian Pineapple Company were for the purpose of inducing or encouraging said employees of the plaintiff Hawaiian Pineapple Company or any employee of any other employer to take concerted action in the course of their employment to refuse to perform any services as to the pineapple. You may consider that also to determine whether it was an object of any inducement or encouragement which you may find to force any person to cease dealing with the Hawaiian Pineapple Company. If so, you will in connection with the other instructions which I have given you determine whether that action was illegal or actionable. And that would be true whether such individuals advised the truck drivers of the fact either that the pineapple was ‘hot,’ as the phrase is understood in this proceeding, or that the Port of The Dalles was threatening the working conditions and wages of the Portland longshoremen, provided,

of course, that you find the acts were done as I have set forth in the previous instructions and that the purpose was as outlined.” (TR 1427.)

An exception to this instruction was duly noted. (TR 1458-1460.)

C. The trial Court erred in failing to instruct the jury as requested on the theory of primary boycott as follows:

“If you find that there was a primary strike against Castle and Cook and that Castle and Cook owns and controls the Hawaiian Pineapple Company to such an extent as to dominate its business practices and policies, then I instruct you, that you may consider Castle and Cook as the primary plaintiff herein. If you should so find then I further instruct you, that the strike or boycott in this case is a primary strike or boycott and you may not award any damages against the defendant, save and except for the actual destruction of property or personal injuries sustained.” (Defendants’ Proposed Instruction No. 29, TR 1486.)

“I further instruct you from the evidence in this case, that the strike referred to as taking place in Hawaii from May to about the middle of October of 1949, was a lawful strike, not in violation of any law of the United States or of Hawaii.

“I further instruct you the trade unions are organizations favored by the public policy of the United States and that people may join trade unions and participate therein, and in so doing have the approval of the public policy of the

United States.” (Defendants’ Proposed Instruction No. 30, TR 1487.)

The trial Court compounded this error by specifically instructing the jury as follows:

“There is no evidence in this case that this was a primary strike as far as the Hawaiian local was concerned.

“There is no evidence in this case that the Hawaiian Pineapple Company had any strike of its own employes, or that it was picketed, or that there was any difficulty at the time that the barge left Hawaii.” (TR 1431-1432.)

Exceptions to the failure to give the requested instructions and to the instruction given were duly noted. (TR 1453.)

5. The verdict is contrary to the law and the clear weight of the evidence.

6. The verdict is so excessive as to have been rendered as a result of passion or prejudice.

7. The verdict is inconsistent.

SUMMARY OF ARGUMENT.

1. A vital issue in the case was whether or not Meehan was an agent of the International or Local 8, and whether or not Meehan and Toby Christiansen were agents of Local 8. By instructing the jury that these men along with others were in fact agents, the trial Court denied to appellants a jury trial on this

issue. This error of the trial Court was prejudicial and requires a reversal of the judgments irrespective of how compelling or convincing the evidence might have been. The question was one of fact to be determined by the jury and it was error to direct a verdict, in effect, against appellants.

2. The exculpation from liability of Meehan, admittedly an employee of the International, and Christiansen and Baker, admittedly employees of Local 8, requires that the judgment against appellants be set aside. Appellants' liability could only be based upon a *respondeat superior* theory. Appellants could obviously only function through human beings. If the human beings were found not to be liable for the acts complained of, then appellants are not liable.

3. Liability under the Labor-Management Relations Act of 1947 can arise only if there is a secondary boycott and the activity is engaged in for the objects enumerated in the statute. That was not the case here and the failure of the trial Court to instruct properly on the elements of liability under the statute was prejudicial error. The trial Court's refusal to instruct on appellants' theory of primary boycott and its refusal to entertain proof to show the economic relationship between Pineapple and the struck stevedoring companies in Hawaii was also prejudicial error. Appellants were entitled to instructions respecting their right to communicate freely their views on the controversy, and the trial Court's refusal to give such instructions as requested was prejudicial error.

4. The instruction on minimization of damages was inadequate and the jury's assessment of damages failed to take into account uncontroverted record evidence that the damages could have been minimized but were not. The prejudice engendered by the testimony concerning the two injured employees of Pineapple undoubtedly contributed to this result and therefore the failure to grant appellants' motion to sever those cases from this resulted in prejudice to appellants.

ARGUMENT.

I.

**THE TRIAL COURT ERRED IN TAKING THE ISSUE OF THE
EXISTENCE OF AN AGENCY RELATIONSHIP FROM THE
JURY.**

When the trial Court charged that "Matt Meehan, William Gettings, Henry Schmidt and Howard Bodine were agents and representatives of the defendant International * * * and that Toby Christiansen and Matt Meehan were agents and representatives of defendant Local 8" (TR 1462), it deprived appellants of a jury trial on the issue and *pro tanto* invaded the province of the jury.

A. The existence of an agency relationship was clearly an issue in this case.

Throughout the proceedings the existence of an agency relationship between the International and Local 8 and the above-named individuals was a sharply contested issue of fact. The pretrial order

reveals that appellant unions contended that neither Meehan nor any of the named individuals were the agents of the International in relation to any of the matters set forth in plaintiff's contentions. (TR 64.) The trial Court, itself, recognized the contested status of this question by formulating one of the issues in the pretrial order as follows:

“(12) Was either Local 8 or any of the individual defendants named the authorized representative or agent of the International?” (TR 67.)⁶

Thus both the pleadings, and the pretrial order which superseded the pleadings, posed the existence of the agency relationship as one of contested fact.

There was evidence in the record from which the jury might have found that no agency relationship existed as between any of the above-named individuals and the International. There was evidence that defendant Meehan represented only Local 8 in the matters about which plaintiff complained. (TR 1197-1198, 1335, 1336-1337, 1348.) There was evidence that the International exercised no control over, and issued no instructions to, Meehan affecting matters in The Dalles (TR 763, 782, 787, 1213-1214, 1358, 1371-1372.) There was evidence that Bodine was not even employed by the International. (TR 717.) There was evidence that Schmidt was merely an employee of the International and not its agent with respect to the

⁶Two other issues embrace the same problem, viz.: “(6) Did the International engage in the acts and conduct alleged by plaintiff” and “(7) Did Local 8 engage in the acts and conduct alleged by plaintiff?” (TR 66.)

matters that occurred in The Dalles. (TR 704.) Similarly as to Gettings, there was evidence that he was not an agent with respect to The Dalles incidents. (TR 700-704.) The existence in the record of such contrary evidence as appellant is likely to call to the attention of this Court will not answer appellant's basic contention: that it was the function of the jury, not the Court, to decide whether Pineapple had established by a preponderance of the evidence, the existence of an agency relationship.

B. Appellants' proposed instructions were consistent with the theory that the existence of agency was a contested issue.

Appellants proposed instructions based upon the pleadings and the evidence in this case which, if given, would have required a jury finding on the question of agency relationship. (Supp. TR 1484-1488, Nos. 9, 28 and 33.) Upon the Court's failure to give these proposed instructions appellants' counsel specifically objected:

"With respect to the matter of agency, your Honor stated categorically to the jury and you informed them that Meehan, Gettings, Schmidt and Bodine were agents of the International Union. We respectfully take exception to that instruction, and we say that the evidence shows that Meehan, Gettings and Schmidt were employees of the International Union and not agents, and that the evidence shows that Bodine was an employee of the Joint Union-Employer Committee and not even an employee of the Union. But, in any case, whether any of these people were agents is a question that should go

to the jury and they should not have been instructed as your Honor did that these four named persons were agents of the International Union.” (TR 1462.)

The trial Court responded to this clear objection by saying:

“I will have to take a chance on that one.” (TR 1462.)

Hence there was more than ample opportunity for the Court to have given proper instructions which would have permitted the jury to exercise its rightful function as the finder of fact on the vital agency questions presented.

C. The existence of the agency relationship should have been submitted to the jury.

Whether an agency relationship exists is a question of fact for the jury (*Mitton v. Granite State Fire Ins. Co.*, 196 F. 2d 988 [1952]; *Pacific Can Co. v. Hughes*, 95 F. 2d 42 [1938]; *Riverside Fiber & Paper Co. v. O. C. Keckley Co.*, 32 F. 2d 23 [1929]; 3 *C.J.S.*, Agency, p. 323, §330; 2 *Am. Jur.*, Agency, p. 359, §454; Mechem, *Outlines of Agency*, 3d ed., §§ 106, 223). The Supreme Court has indicated that no matter how conclusive the evidence, a failure to permit the jury to resolve the question requires a reversal (*United Brotherhood of Carpenters, etc. v. United States*, 330 U.S. 395 [1947]).

The common law rules of agency apply under the Labor Management Relations Act, as amended. The

term “agent” as used in §301 of the Labor Management Relations Act, as amended, 61 Stat. 156, 29 U.S.C. 185, requires the application of the “ordinary law of agency”⁷ (*Matter of Sunset Line & Twine Co.*, 79 NLRB 1487 [1948]; *Matter of Perry Norvell Co.*, 80 NLRB 225 [1948]; cf. *Matter of Colonial Hardwood Flooring Co., Inc.*, 84 NLRB 563 [1949] [in which agency was admitted]).

The responsibility of a union, as principal, for damage resulting from sudden acts of violence engaged in by its members or members of an affiliate, is a subject which has resulted in important Supreme Court decisions (*The Coronado Cases*, 259 U.S. 344 [1922]; 268 U.S. 295 [1925]; *United Brotherhood etc. v. United States*, *supra*); in Congressional efforts to make certain that such responsibility be not imposed on mere speculation and surmise (§6, Norris-LaGuardia Act, 29 U.S.C.A. §106); and in decisions of the National Labor Relations Board (*Matter of Sunset Line & Twine Co.*, *supra*; *Matter of Perry Norvell Co.*, *supra*; *Matter of Colonial Hardwood Flooring Co., Inc.*, *supra*)—all of which indicate the care needed in making agency determinations in this field.

⁷The quoted phrase is from Senator Taft's analysis of the 1947 amendments, 93 Daily Cong. Rec. 700 [June 12, 1947]. The legislative debates and committee reports contain numerous other statements to the same effect by proponents of the amendments. See House Conf. Rept. No. 510, 80th Cong., 1st Sess., 36; 93 Cong. Rec. [Sen.] 6599 [June 5, 1947]; *id.*, 7001 [June 12, 1947].

The determination of whether an agency relationship exists is peculiarly a question of fact where, as here, the scope of the agency is unclear. Thus a person can perform services for another and become his agent in the performance of *those* services; that is, he may become the other's agent as to some acts and not as to others (*Restatement of Agency*, §227).

In the instant case there was not only the question whether certain named individuals were agents and for what acts but also, if they or any of them were agents, *whose* agents they were. For here, there was more than one alleged principal involved. In this posture of the case, then, and wholly irrespective of the sufficiency of the evidence, the agency determination was a fact question exclusively within the province of the jury to determine.

The effect of the refusal to allow the jury to determine whether an agency relationship in fact existed and if so, what it was and whether Local 8 or the International or both, or neither, were the principals with respect to these certain individuals, was to deprive appellants of a jury trial on an issue crucial to the liability of the unions involved.

Under the instructions as given by the Court, the jury might have found that it was the acts of Bodine which resulted in the imputed liability to the International. Yet Bodine was not even an employee of the International or Local 8. Or the jury might have found that it was the acts of Schmidt, a union employee who was in Hawaii throughout the period

herein involved, for which the International was liable. Yet there is no evidence that Schmidt acted in a representative capacity for the International with respect to the incidents at The Dalles. Liability of the International might have been based on a finding that Gettings was its agent, yet Gettings was not present in The Dalles throughout the period herein involved and did not participate in supervising or directing the conduct of Local 8's members. Meehan was the only individual among those named in the Court's instructions who was present in The Dalles and he was the only one of such individuals named as a defendant. Whether he was an agent of the International, or Local 8, or neither, was most sharply contested throughout this case.

Under appellants' proposed instructions and on the evidence in this record the jury might have found either that none of the individuals named were agents of the International or Local 8 or that those individuals who were found to be agents did not perform such acts within the scope of their employment or with prior authorization or subsequent ratification of the International or Local 8 as would have rendered the International or Local 8 liable.

But, under the instructions given, once prohibited conduct within the scope of employment was found, liability followed automatically even though such conduct was engaged in by one like Bodine who was not even an employee of either the International or Local 8. The withholding of this vital question of fact

from the jury, thus permitted the trial Court rather than the jury to determine liability, in violation of all well-known concepts of agency and in effect directed a verdict against both unions (*United Brotherhood of Carpenters, etc. v. United States, supra*).

II.

THE INCONSISTENCY OF THE VERDICT REQUIRES THAT IT BE SET ASIDE.

The verdict (TR 136) imposing liability on both appellants (unions) but exonerating all individual defendants, is inconsistent and illogical, and irreconcilable with any theory upon which this case was tried or presented to the jury. A verdict which is inconsistent for imposing liability on the principal while exculpating the agent, can be the result only of a misapplication of the law or a bias against the principal which require a reversal.

In this case the jury was correctly instructed that a union is an entity which can act only through human agents. (TR 1432.) In this case plaintiff claimed its damages arose from a "twenty minute" eruption of violence participated in by the individual defendants. (TR 228.) Therefore such union responsibility as is alleged to exist must rest on the conduct of the individuals who allegedly participated in that violence. But the verdict here exonerating all the individual defendants from liability means that no named in-

dividual engaged in any unlawful activity. Thus the verdict absolved the human agents from liability; yet inconsistently the jury found the unions liable.

This is not a logical abstraction, but in this case takes on real substance since several of the individual defendants who were exculpated—Baker and Christiansen on the one hand and Meehan on the other—were admittedly officers or employees of the union defendants and were charged by the Court to have been agents. Clearly the exoneration of these people raises serious questions as to the legal validity of a theory which can hold their “principals” liable.

A. The liability of the International and Local 8 could only derive from liability of individual defendants.

Under ordinary rules of agency, as well as under the instructions given by the Court below, it was necessary, in order to find the unions liable, to prove that union agents engaged in certain conduct within the scope of their employment. (TR 1432-1434.) Thus, since union liability depended upon, and was secondary to, the liability of the human agents, the verdict herein of non-liability of *any* union agent cannot be reconciled with liability of the unions.

“* * * where employer and employee are joined as parties defendant in an action for injuries inflicted by the employee, a verdict which exonerates the employee from liability for injuries caused solely by the alleged negligence or misfeasance of the employee requires also the exoneration of the employer, and although the verdict

purports to hold the employer liable, it cannot form the basis of a judgment against the employer but must be set aside”.

35 *Am. Jur.* 962, Master and Servant, §534.

See also:

Dirie Ohio Express Co. v. Posten, 170 F. 2d 446 (1948);

King v. Stuart Motor Co., 52 F. Supp. 727 (1943);

Portland Gold Mining Co. v. Stratton's Independence, 158 F. 63 (1903);

16 *A.L.R.* 2d 969;

2 *Am. Jur.* 361, Agency §455;

53 *Am. Jur.* 726, Trial, §1049;

30 *Am. Jur.* 977, Judgment, §249.

The Supreme Court said in *New Orleans & N. E. R. Co. v. Jopes*, 142 U.S. 18 (1891):

“It would seem on general principles that, if the party who actually causes the injury is free from all civil and criminal liability therefor, his employer must also be entitled to a like immunity * * * if an act of an employee be lawful, and one which he is justified in doing, and which casts no personal responsibility upon him, no responsibility attaches to the employer therefor.”

These rules, applied here, require a reversal of the judgment against appellants.

It is no answer to say that liability might have been established against appellant-unions without the joinder of any individual defendants. This is not

that case. Here the individual defendants upon whose conduct the liability of the unions is said to depend *were* joined and their liability was drawn into question and adjudicated. And the adjudication was in their favor and consequently in favor of their principals. This fact cannot be gainsaid.

B. Even if the jury verdict merely means that it found no “conspiracy”, the verdict is inconsistent.

Nor is it an answer to assert that the liability of the individuals was sought to be established on the basis of a “conspiracy theory” which somehow was different from the basis upon which the unions were sought to be held liable.

One of the issues set forth in the pretrial order was whether

“* * * there [was] any conspiracy to injure the plaintiff in its business, as alleged, which said conspiracy was participated in by the defendant International, the defendant Local, the defendant individuals or any of them” (TR 68.)

The Court instructed that the jury might find a conspiracy between Local 8 and the International *through their officers, agents and members* (TR 1434) and a conspiracy between “the individual defendants among themselves or together with the Defendants International and Local 8, or either of the unions * * * (TR 1436-1437.)

It is impossible to determine with certainty whether or not the jury found Local and International liable because of an alleged “conspiracy” or because of a

claimed Taft-Hartley violation.⁸ As to the conspiracy, clearly the verdict as to the individual defendants exonerated them from liability for such a "conspiracy"; and since the unions could only so conspire through their human agents, officers and members, it must be that the jury verdict absolving the individuals from liability as conspirators means that the jury found that Local and International did not so conspire.

Upon the basis of the same damage alleged to have arisen from the same conduct by the same individuals at the same time and place⁹ as grounded the cause of action purportedly stated under the Labor Management Relations Act, plaintiff sought to erect an additional common law liability upon the individual defendants by adding a charge of "conspiracy". But although the Court below treated the "conspiracy" allegation as though it created a separate ground of liability (TR 1435;¹⁰ *Curto v. International Longshoremen's and Warehousemen's Union*, 107 F. Supp. 805, 812 [1952]), the "conspiracy" allegation added nothing of distinguishable legal or factual substance to plaintiff's statutory claim for relief.

⁸That the jury was improperly charged on the latter score, and that a verdict based on this theory is not sustainable, is discussed *infra*.

⁹Plaintiff's counsel admitted that the same facts and the same witnesses were involved. (TR 228.)

¹⁰Although appellants deny that a common law liability could have been stated against the individual defendants in view of the preemption of the field by federal legislation, so far as the jury was instructed, a verdict imposing liability on the individuals could have been returned.

The Court instructed the jury with regard to the alleged "conspiracy" that "It is sufficient if the evidence shows a *concert of action* between two or more persons to accomplish an unlawful purpose". (RT 1438.) Such an instruction accords with the distinction regularly made between civil and criminal conspiracy, namely, that in civil conspiracy the agreement or combination does not receive the stress that it does in criminal conspiracy.

"The gist of the civil action for conspiracy is the act or acts committed in pursuance thereof—the damage—not the conspiracy or combination. The combination may be of no consequence except as bearing upon rules of evidence or the persons liable".

11 *Am. Jur.* 577, Conspiracy, §45.

See also:

Brixtson v. Woodrough, 164 F. 2d 107 (1947);
Connolly v. Gishwiller, 162 F. 2d 428 (1947);
Calcutt v. Gerig, 271 F. 220 (1921).

Under these instructions, the jury could have imposed liability upon an *individual* defendant merely on proof that there was a "concert of action" to accomplish the alleged unlawful purpose between such defendant and any other individual or individuals or between such defendant and Local 8 or the International or both. Thus, the jury verdict necessarily established that none of the individual defendants engaged in a "concert of action" with any other individual *or with Local 8 or the International*.

Hence, the verdict of liability here as to Local 8 and the International, resting as it must upon a finding of unlawful acts performed by one or more individual defendants who stood in an agency relationship with either or both unions, cannot be reconciled with the verdict which exonerates *every such individual defendant* from liability for a “concert of action” to accomplish the same unlawful acts. For under the pleadings, the evidence and the instructions, a “concert of action” necessarily embraced the existence of an agency relationship and acts by agents within the scope of their employment to achieve an unlawful purpose. The failure to find such a “concert of action” requires a rejection of the finding that the principals were liable.

In view of the manner in which this case was presented to the jury by both Pineapple and the Court below, the verdict finding no liability for a “concert of action” to accomplish the unlawful purpose between any individuals or between any individual and the unions—especially in the case of Meehan whom the Court held to be an “agent” of both unions and who was the most active “agent” in relation to the occurrences at The Dalles—is illogical and contradictory and cannot be squared with a finding of agency or activity within the scope of agency so as to justify liability of the union principals.

Hence, although distinctions may be, and understandably will be attempted to be, made between an agency relationship and a civil conspiracy in general,

in this case the unions could not be held liable for acts of individuals while at the same time each and every individual was absolved from liability for a "concert of action" relating to the same acts.

It is notorious that "it is not uncommon for juries, activated by sympathy, bias, or mistake to return a verdict holding the master liable but exonerating the servant" (16 A.L.R. 2d 969). Whether the verdict in this case resulted from mistake or misapprehension of the law, or a bias against the unions involved, or from a sympathy toward the individual defendants—it must in any event be set aside. It is just not sustainable as a matter of law.

It is to be noted that early in these proceedings appellants moved that the personal injury suits (*supra*, n. 2) be severed from the suit brought by Pineapple because of the inherent danger of passion and prejudice present in the former actions. (TR 226.) Although this point is dealt with later in this brief in connection with the matter of excessive damages, it is not entirely without relevance here that the Court in denying appellants' request for severance (TR 227) helped to create a situation in which an inconsistent verdict based upon precisely the bias, prejudice and sympathy or mistake was possible.

Whatever the reason, one cannot rationally exculpate an agent while holding his master. The verdict must therefore be set aside.

III.

THERE WAS NO VIOLATION OF SECTION 303(a)
OF THE TAFT-HARTLEY ACT.**A. Section 303(a) of the Taft-Hartley Act condemns only secondary—not primary—activity.**

Section 303(a) of the Labor Management Relations Act of 1947, *supra*, reads in relevant part as follows:

“It shall be unlawful * * * in an industry or activity affecting commerce, for any labor organization to engage in, or to induce or encourage the employees of any employer to engage in, a strike or a concerted refusal in the course of their employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services, where an object thereof is—

“(a) forcing or requiring * * * any employer or other person * * * to cease doing business with any other person.”¹¹

1. Section 303(a) has been so construed consistently.

The Courts and the Labor Board have uniformly interpreted this section as a ban only upon secondary activity. *NLRB v. Denver Building & Construction Trades Council*, 341 U.S. 675; *NLRB v. International Rice Milling Co.*, 341 U.S. 665; *International Brotherhood of Electrical Workers v. NLRB*, 341 U.S. 694;

¹¹The following language of subsection (a) is omitted from the above quotation because it was not made the basis of the Court's charge (TR 1424-6) and is not deemed significant herein: “to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or”.

Douds v. Sheet Metal Workers International Association, 101 F. Supp. 273; *Oil Workers International Union and Pure Oil Co.*, 84 NLRB 315.

The Supreme Court explored the Congressional history of Section 158(a)—the unfair labor practice section of the Taft-Hartley Act, the language of which, so far as relevant, is identical with that contained in Section 303(a)—and said, in the *Denver Construction* case, *supra*, at page 686:

“While §8(b)(4) does not expressly mention ‘primary’ or ‘secondary’ disputes, strikes or boycotts, that section is often referred to in the Act’s legislative history as one of the Act’s ‘secondary boycott sections’. The other is §303 * * * *which uses the same language in defining the basis for private actions for damages caused by these proscribed activities.*”

In the companion *International Brotherhood of Electrical Workers* case, *supra*, at page 705, the Supreme Court said: “The substantive evil condemned by Congress in 8(b)(4) is the secondary boycott * * *” In construing this provision, the Labor Board has found that it was “clear from legislative history that [the section] * * * was aimed at *secondary* and not *primary* action.” *Pure Oil Co.*, *supra*.

2. Such a construction was necessary.

It was necessary for the Courts and the Labor Board to confine Sections 158(a) and 303(a) to secondary activity for “* * * read literally, 8(b)(4)(A) would invalidate most picketing.” Comment, *The*

Impact of the Taft-Hartley Act on the Building and Construction Industry, 60 Yale L. J. 684 (1951). It is difficult to conceive of any picket line established during the course of any labor dispute which does not have as one of its objectives the interruption of business between the employer at the picketed premises and some other employer or person. A cessation of business is usually the desired effect of any strike, and a picket line traditionally is the means to achieve such an effect. As the Supreme Court said in *NLRB v. International Rice Milling Co.*, 341 U.S. 665, 672-3:

“That Congress did not seek, by §8(b)(4) to interfere with the ordinary strike has been indicated recently by this Court. This is emphasized in §13 as follows: ‘Nothing in the Act, except as specifically provided for herein, shall be construed so as either to interfere with or impede or diminish in any way the right to strike, or to affect the limitations or qualifications on that right.’ 61 Stat. 151, 29 U.S.C. (Supp. III) §163, 29 U.S.C.A. §163.

“By §13, Congress has made it clear that §8(b)(4), and all other parts of the Act which otherwise might be read so as to interfere with, impede or diminish the union’s traditional right to strike, may be so read only if such interference, impediment or diminution is ‘specifically provided for’ in the Act.”

3. Section 303(a) prohibits the secondary boycott as it was formerly known.

Section 303(a) merely reinstates the secondary boycott law as it existed prior to the passage of the

Norris-LaGuardia Act. 29 U.S.C.A. §101 et seq. Senator Taft, who was the sponsor of the bill in the Senate and was the Chairman of the Senate Committee on Labor and Public Welfare in charge of the bill, said, in discussing this section:

“* * * under the provisions of the Norris-LaGuardia Act, it became impossible to stop a secondary boycott or any other kind of a strike, no matter how unlawful it may have been at common law. All this provision of the bill does is to reverse the effect of the law as to secondary boycotts.” (93 Cong. Rec. 4198.)

In a recent, well-reasoned opinion it was said

“* * * the purpose of this provision of the Taft-Hartley Act was to outlaw the ‘secondary’ boycott, as constituting an unfair labor practice. Having then reached the conclusion that the unfair practice described in this section was that known under the common law as a secondary boycott, the trend of the decisions was to determine what a secondary boycott is.” (*Douds v. Sheet Metal Workers International Association*, 101 F. Supp. 273, 276.)

B. Determining whether a secondary boycott exists is a complex question of law and fact.

What fact situations fall within the ban of Section 303(a) is not free from doubt. It has been observed that “Probably no other provision of the LMRA is as difficult to understand as Section 8(b)(4)(a).” Note, *Developments in the Law—The Taft-Hartley Act*, 64 Harv. L. Rev. 781, 798 (1951). The Supreme

Court has said that “* * * each case must be considered in the light of its surrounding circumstances * * *” *NLRB v. International Rice Milling Co.*, 314 U.S. 665, 670.

1. Clear definitions are available.

Judge Learned Hand authoritatively defined a secondary boycott in *International Brotherhood of Electrical Workers v. NLRB*, 181 F. 2d 34, 37, affirmed 341 U.S. 694, in the following language:

“The gravamen of a secondary boycott is that its sanctions bear, not upon the employer who alone is a party to the dispute, but upon some third party who has no concern in it. Its aim is to compel him to stop business with the employer in the hope that this will induce the employer to give in to his employees’ demands.”

A secondary boycott has been said to exist

“* * * when a labor organization having a labor dispute with employer A induces or encourages employees of employer B, with whom the union has no dispute, to refuse to handle goods or perform services for employer B, with the object of causing B to cease to do business with A, the employer with whom the union is involved in a labor dispute. In other words what is prohibited is any attempt to bring pressure to bear on ‘secondary’ employers who are neutral in the labor dispute for the purpose of effecting, by such measures, ultimate pressure upon the ‘primary’ employer.” *Doubs v. Sheet Metal Workers International Association*, 101 F. Supp. 273, 277.

2. There must be a primary labor dispute.

By definition, at least, a secondary boycott thus requires the existence of a primary employer, a secondary employer and a labor dispute between a union and the primary employer. Appellants are unaware of a secondary boycott case which does not include each of these elements. As the Court said in the *Sheet Metal Workers* case, *supra*, at 278:

“Implicit in the idea of a secondary boycott is the fact that there is a labor dispute between a labor organization and an employer, and that the boycott charged is directed against another employer who is neutral to the dispute.”

In rationalizing the latest Supreme Court cases which carefully examined the secondary boycott language of the Taft-Hartley Act, the Court there continued:

“In cases recently decided by the Supreme Court, reported in 341 U.S., 71 S. Ct., referred to above, the facts in each case disclose the existence of a labor dispute between the labor organization involved and the employer with whom another employer is forced to cease doing business because of a ‘boycott’ directed against the second employer by the labor organization. In each case, the second employer against whom the ‘boycott’ was directed was regarded by the Court as a neutral in the dispute considered to be the cause of the practices of the union found to be contrary to law.” *Ibid.*

3. Violence is immaterial.

It is of no significance in determining whether a secondary boycott exists that there has been picket

line violence. Thus, as the Supreme Court said in *NLRB v. International Rice Milling Co.*, 341 U.S. 665, 672:

“The substitution of violent coercion in place of peaceful persuasion would not in itself bring the complained-of conduct into conflict with §8(b)(4). It is the object of union encouragement that is proscribed by that section, rather than the means adopted to make it felt.”

In *Douds v. Metropolitan Federation*, 75 F. Supp. 672, the Court found primary rather than secondary activity despite picket line violence. *Cf. International Union of Auto Workers v. Wisconsin Employment Relations Board*, 336 U.S. 245, 253.

4. Complexities lead to conflict, or at least to a lack of uniformity, between the Courts and the Labor Board.

The complex legal and factual questions involved in many secondary boycott situations are further aggravated by the fact that both the Courts and the National Labor Relations Board afford remedies under identical statutory language. See e.g. *ILWU v. Juneau Spruce Corp.*, 342 U.S. 237. Compare *United Brick & Clay Workers v. Deena Artware*, 198 F. 2d 637, with *NLRB v. Deena Artware*, 198 F. 2d 645, in which on the same facts the Court upheld a jury award to Deena in the former, and upheld the Labor Board's dismissal of a complaint for a cease and desist order in the latter.

Especially with respect to the secondary boycott provisions of the Taft-Hartley Act does one find the

dichotomy between the judicial process and the administrative process in the field of industrial relations. A Court is challenged to make a complete and systematic investigation of the issues involved in the particular dispute in order to apply the secondary boycott provisions as uniformly, precisely and efficiently as the Labor Board—organized, equipped and staffed as it is with trained and experienced experts. See Millis and Brown, *“From the Wagner Act to Taft-Hartley”*, Chicago (1950), p. 75; Final Report, *Attorney General’s Committee on Administrative Procedure*, Washington, D. C. (1941), pp. 11-17; Chang, *Secondary Pressures Under the Taft-Hartley Act*, 12 *Lawyers Guild Review* 55, 64 (1953).

It is submitted that the Court below was so overwhelmed by the legal and factual complexities involved in this case as well as the violence shown that it did not correctly apply the foregoing principles. The balance of this argument will demonstrate the most serious errors.

C. There was primary activity at The Dalles.

1. **There was uncontradicted evidence of a labor dispute with the Port of The Dalles.**

Both Local 8 and the International had jurisdiction over unloading operations at Oregon wharf facilities. There was evidence that Local 8 had performed unloading services at The Dalles prior to the incidents herein involved. (TR 766.) There was evidence of efforts to negotiate with the Port Commission of The

Dalles for the unloading of the pineapple barge.¹² (TR 766, 877, 900.) There was evidence that Local 8 feared the economic effect of the use by the Port of The Dalles of nonunion employees to unload the barge under substandard conditions. (TR 806, 807, 838, 900, 902, 1240, 1285-1286, 1365.) In response to a question put by appellee's counsel as to the reason for the picketing at The Dalles, Matt Meehan said:

“For the reason that our wage structure and our hours of employment, conditions of labor, were being endangered; that the work was being carried on by members of other organizations, and we had contracts for that work in every port on the Pacific Coast. We were picketing because they were working the men 8 hours a day for a dollar and a half an hour, when our wage scale was \$1.82 and time and a half after 6 hours. We were picketing because, too, we have a 2100-pound load limit in our contract, and these people were unloading as much as they could reach up and pile the cases on. They were breaking down our conditions.” (TR 806.)

Appellants' evidence of primary activity directed against the Port of The Dalles was wholly uncontradicted.

The Court below erred in concluding that there was no primary labor dispute involving the Port of The Dalles.

¹²Since the Port of The Dalles is not an “employer”, picketing activity against it to achieve union conditions does not violate any provision of the Taft-Hartley Act.

2. **There was uncontradicted evidence of primary activity against Hawaiian Pineapple.**

Longshore agreements are frequently made with shipowners who have their own stevedores. At The Dalles it wasn't clear whose employees the stevedores would be. Local 8 was concerned with the persons who would unload the barge and the conditions under which they would work, irrespective of whether such persons were employees of the Port of The Dalles or of Pineapple. (TR 1285-1286.) Therefore, to the extent that the stevedoring was to be done by Pineapple's employees, primary picketing activity was conducted against Pineapple.

Furthermore, as will be shown below, appellants were prepared to show a unity of interest between Pineapple and the Hawaiian longshore employers if Pineapple sought to picture those employers as the primary employer and Pineapple as a neutral secondary employer. As the case proceeded, however, it became clear that neither appellee nor the Court did anything more with this theory than permit it to obscure the actual charge and the proof.

The Court below erred in concluding that there was no primary labor dispute involving Pineapple.

- D. **The Court below erroneously gave no effect to the primary activity.**

1. **As to The Dalles.**

The Court below instructed the jury that it might consider whether conversations between certain longshoremen and Pineapple's truck drivers were for the

purpose of inducing said employees to take concerted action to refuse to perform services for Pineapple and whether the object of such inducement was to force any person to cease dealing with Pineapple. The Court further instructed that it might find such conduct illegal even if the drivers were told "that the Port of The Dalles was threatening the working conditions and wages of the Portland longshoremen * * *" (TR 1427.)

The vice in this instruction is that if, as appellants contend, there was primary activity against the Port of The Dalles, the conversations with the truck drivers were privileged. *NLRB v. International Rice Milling Co.*, 341 U.S. 665.

But the Court below did not find it necessary to determine whether there was a primary labor dispute involving the Port of The Dalles. Instead, it merely instructed "That the Port of The Dalles is not 'an employer' or 'other person'." (TR 1424.) Although this instruction is correct, it did not require that the primary dispute with The Dalles be read out of the case for all purposes.

The Court also instructed the jury that:

"If you find that neither of the defendant unions induced or encouraged the employees of an employer, as plaintiff claims, or that such inducement or encouragement was *solely* for the purpose of concerted activity on account of wages, hours or conditions of employment, as the defendants claim, or to obtain jobs for themselves, then your verdict should be for all of the defendants." (TR 1429.)

Clearly, if the activity directed against the Port of The Dalles was primary activity, the emphasis resulting from the use of the word "solely" imposed too heavy a burden upon appellants. Under this instruction, the Court blurred the distinction between secondary activity with a secondary *object* and primary activity with a secondary *effect*.

Open to the same objections as are stated above, is the instruction of the Court that:

"If you find one of the objects of any inducement or encouragement was to force any person to cease doing business with any other persons it would make no difference that the International or Local 8 or the persons whom you find, if you do, were inducing or encouraging, had other objects therein, such as conducting a strike on account of wages, hours or conditions of employment of employees of the Port of The Dalles, or such as forcing or requiring the Port of The Dalles to assign the particular work of unloading the barge to employees of Local 8 rather than to employees in another class. In other words, the forcing of a person to cease doing business with another person, if that be one of the objects of the inducement or encouragement, would be sufficient, even though there might be other legitimate objects in mind.

"Even if any acts done or performed by any defendant union were for the purpose of achieving legitimate ends of collective bargaining and the legitimate ends and purposes of trade unionism, such as the prevention of the breaking down of wages and working conditions of Local 8, still,

if a defendant union or two or more defendant unions in concert induced or encouraged employees of any employer, in restraint of trade and commerce, as above described, but another object thereof was to force any person to cease dealing with Hawaiian Pineapple Company, then the plaintiff should prevail on that issue." (TR 1430.)

This instruction cannot be squared with *NLRB v. International Rice Milling Co.*, 341 U.S. 665, or with the Court's explanation of that case in *NLRB v. Denver Building and Construction Trades Council*, 341 U.S. 675. In the latter case the Court said (at 687-8) that in the *International Rice Milling* case, the union "did not engage in a strike" against the "neutral" (herein also there was no strike against any "neutral"); and that the union "did not encourage concerted action" by the "neutral's" employees (herein, as will be shown below, the Court's instructions provided no guidance to the jury in distinguishing between action which is "concerted" and that which is not "concerted").

Each of the foregoing instructions, and, all of them when read together, disclose an erroneous failure to consider whether a labor dispute existed between the unions and the Port of The Dalles, and if so, what effect such dispute, in the light of recent Supreme Court decisions, particularly the *International Rice Milling* case, *supra*, should have been given in the conduct of the trial and in the applicable instructions. If the secondary boycott provisions of the Taft-Hart-

ley provisions are difficult for the Courts and the Labor Board fully to understand and apply, it would seem unlikely that a jury, impassioned by the trial at the same time of two assault cases with evidence of violent injury to persons and property, would fare better under vague, general and legally inaccurate instructions which blur several crucial distinctions in the field.

2. As to Hawaiian Pineapple.

Plaintiff below alleged, in its first amended complaint (TR 30) the existence of a labor dispute between International and its Hawaiian Local and the Waterfront Employers Association of Honolulu. (TR 32.)¹³

Appellants contended that Pineapple was a wholly owned subsidiary and alter ego of certain members of the Waterfront Employers Association (TR 63) and, accordingly, there was posed in the pretrial order (TR 50) as one of the issues the question whether: “* * * the Hawaiian Pineapple Company [was] a subsidiary of Castle & Cooke or any other member of the Big Five and, therefore, the strike as alleged, if any, [was] a primary strike within the meaning of the Taft-Hartley Law?” (TR 67).

¹³The first amended complaint embraced a conspiracy charge. The original complaint did not allege the existence of a labor dispute in Hawaii. Technically, therefore, it would seem that the Hawaiian labor dispute can be no part of the alleged violation of Section 303(a). Without conceding this point, appellants herein treat the Hawaiian labor dispute allegation as though it had relevance to the asserted violation of Section 303(a).

In order to meet the issue thus raised appellants consistently contended throughout these proceedings that Pineapple had such an identity with the Hawaiian employers with whom International and the Hawaiian Local were engaged in a dispute that any activity by International directed against Pineapple at The Dalles was primary activity. Thus appellants introduced evidence relevant to this contention (TR 537, 541, 1072); made an offer of proof thereupon which was rejected by the Court (TR 1177) (See *Curto v. I.L.W.U.*, 107 F. Supp. 805, 815); requested an instruction embodying the gist of this contention (TR 1486); and objected to the Court's refusal to give an instruction to the jury bearing upon this theory (TR 1453).

As appellants' counsel put it in excepting to the Court's instructions:

"* * * there is evidence from which the jury could find that this was a primary boycott against a corporation which was so intimately connected with those that were involved in the strike in Hawaii that the jury would have a right to find that this was a primary boycott. And since there is such evidence we think we are entitled to an instruction expressing our theory of the case so that the jury would have an opportunity to choose that theory if they so found from the evidence." (TR 1453.)

To this the Court responded:

"I don't think that we are here to try out the economy of Hawaii. So far as I am concerned

I am not going to import any Hawaiian labor troubles into the United States. This, I think, is an attempt to import both problems into this Court. There is no evidence in this record of the supposed domination.¹⁴ It may have been error to exclude it but I don't think it was. There is no evidence in the record, so it is not a proper question to go to the jury. In the second place there is no evidence in this record that there was any strike which involved the Hawaiian Pineapple Company.¹⁵ In the third place, there is no direct evidence in this case of any lawful strike with which this particular picket sent over here was concerned."¹⁶

Prior to making the offer of proof, appellants' counsel said:

"And thus we expect to show that actually Castle & Cooke, being one of the firms against whom this strike was directed in the Islands that they in turn, through their stock directorates and through their stock ownership, control the Hawaiian Pineapple Corporation, so that they are actually the other hand of Castle & Cooke to the end that it is actually a primary strike so far as Hawaiian Pineapple is concerned." (TR 1173-1174.)

¹⁴For evidence of dominance see TR 537, 541, 1072.

¹⁵This was the question at issue, to-wit: whether because of dominance there was a labor dispute with Hawaiian Pineapple.

¹⁶There was evidence of the Hawaiian strike. See e.g. Tr. 494, 501. Its lawfulness was to be presumed in the absence of evidence to the contrary offered by plaintiff who had the burden of proving a secondary boycott. *Cf. Sheet Metal Workers* case, *supra* at 277, to the effect that petitioner for an injunction must establish "that the act or acts of respondent constitute a secondary boycott."

By rejecting the offer of proof and by excluding the evidence of domination, the Court below ruled, in effect, that even if Pineapple were shown to be dominated by and the alter ego of Castle & Cooke, it would have no effect upon the alleged boycott. Thus the Court said of the attempt to prove domination: "Even if you found it out, this hasn't anything to do with the strike in the Hawaiian Islands". (TR 1175.)

Subsequently, in his instructions to the jury the Court said:

"The presence of a member of the Hawaiian Local at the entrance to the property of the Port of The Dalles, *whatever his purpose* or that of his local, furnished no justification or excuse for any action or for picketing or for inducement or encouragement of other persons or employees by the International or Local 8 or any members thereof.

"If you find that a member from the Hawaiian Local had *a legitimate reason* for his presence at the entrance of the Port of The Dalles, that would furnish no reason, justification or excuse for any action you may find by the International, Local 8, or any member thereof.

* * * * *

"There is no evidence in this case that this was a primary strike as far as the Hawaiian local was concerned." (TR 1431.)

The cumulative effect of the foregoing instructions together with the Court's exclusion of the "domination" evidence was that even if it were proven that Hawaiian Pineapple was within the "ally doctrine"

(see *Douds v. Metropolitan Federation*, 75 F. Supp. 672 which would have resulted in a finding that there was primary activity against Pineapple so far as the Hawaiian strike was concerned, such proof nevertheless would not reach the charge of secondary activity as affecting the employers and employees at The Dalles. Thus, apparently, the Court below had concluded that the secondary boycott alleged did not involve the Hawaiian strike. Only such an interpretation will give meaning to the Court's instruction that a legitimate purpose of the Hawaiian picket at The Dalles would not affect the liability of International in view of the *Metropolitan Federation* case, *supra*. Certainly the mere distance from Hawaii alone is not enough to suggest a different construction. See *Schultz Refrigerated Service, Inc.*, 87 NLRB 502 (1949); *Moore Drydock Co.*, 92 NLRB 547 (1950); *Cf. Sterling Beverages, Inc.*, 90 NLRB 401 (1950). Nor would the joining of the Hawaiian picket by members of Local 8 change the result. *NLRB v. International Rice Milling Co.*, 341 U.S. 665, 669.

If the Hawaiian strike is given any effect in these proceedings, then appellants were entitled to show, if they could, that Pineapple, as the alter ego of Castle & Cooke, was a legitimate target of primary activity. Since appellant was prevented from making that showing, the Hawaiian strike may not be allowed into these proceedings with its "brooding omnipresence" for any purpose. These proceedings must then be treated as though the allegedly illegal secondary

activity involved only the employers and employees at The Dalles.

It should be noted here that the effect of the rulings thus far considered is that neither the Port nor Pineapple was a primary employer. Since the existence of a primary labor dispute is a prerequisite to secondary activity, there cannot on the record thus far discussed be any finding of such prohibited activity.

E. The instructions of the Court below upon the elements of liability under Section 303(a) were erroneous.

The heart of the instructions of the Court below appears at transcript pages 1424-1426. The first portion of these instructions is as follows:

“If the Plaintiff Hawaiian Pineapple Company, Ltd., has established by a preponderance of the evidence that the International, by and through its officers and agents, and Local 8, and Local 8 itself, through its officers, agents and members, or either the International or Local 8, induced or encouraged the employes of Plaintiff Hawaiian Pineapple Company, Ltd., to engage in a concerted refusal in the course of their employment to transport, handle or work on the cargo of pineapple in commerce, or to perform any services in connection therewith at The Dalles, Oregon, with the object to forcing or requiring Plaintiff Hawaiian Pineapple Company to cease doing business with the Union Pacific Railroad, one of the various trucking companies whose names I gave you a few minutes ago, the Goodat Crane Company, or any of them, or with its

customers in the State of California, to whom the cargo was to be shipped, or any of them, and it is further established that as a direct and proximate result thereof plaintiff sustained damage to its business and property, plaintiff would be entitled to recover as against the defendant union or defendant unions doing the acts with the intent described.”

This instruction permits the jury to find union liability for the alleged unlawful activity if it finds that the unions induced or encouraged the employees of Pineapple to engage in a concerted refusal to work on the cargo of pineapple, with the object of forcing Pineapple to cease doing business with the Union Pacific Railroad, one of several trucking companies, the Goodat Crane Company, or any of them, or with its customers in the State of California, with resulting business and property damage to the plaintiff herein.

This instruction thus treats Pineapple as a secondary employer whose employees are induced to withhold their services in order to apply pressure upon the “primary” employers—the railroad, the trucking companies, the Goodat Crane Company, or California customers. It is clear from the record herein, however, that there was not the slightest hint of a primary dispute involving any of the employers with whom the instruction deals as if they were primary employers. This instruction taken by itself is self-contradictory. First of all, there is clearly no primary dispute with any of the employers named in the instruction. Secondly, it seeks to establish a rule

that a union picketing certain premises in order to force the employer at the picketed premises to cease doing business with other employers with whom there is no primary dispute, may be liable under Section 303(a). However in the absence of a primary dispute with others the picketing activity at the premises of the picketed employer must by hypothesis be primary activity, in which incidental inducements to other employers do not fall within the ban of Section 303(a).

With respect to the Union Pacific Railroad, appellants contend that said railroad is neither an "employer" nor a "person" within the meaning of Section 303(a) and therefore that if there was an effort to force Pineapple to cease doing business with the Union Pacific Railroad, such effort is not within the ban of Section 303(a). Moreover, even if the railroad is a "person", the evidence in this case fails to disclose that Pineapple was forced to cease doing business with the railroad. *One of Pineapple's agents testified that the railroad did not want to do business with Pineapple because it had insufficient equipment to do so and did not wish to engage in a one-way haul.* (TR 1034-5.)

Under these instructions the jury could have imposed liability on both unions because Pineapple was forced to cease doing business with the railroad. Since this was not justified the judgment below must be reversed.

The case with respect to the Goodat Crane Company is no stronger. Pineapple was not forced to cease

doing business with the Crane Company as a result of any inducement by appellants. The evidence is to the effect that an employee refused to cross the picket line at The Dalles because of the rules of *his* union. (TR 882.) After the purchase of the crane by Pineapple on September 27, 1949, the day *before* the riot, there could have been no cessation of business with the Goodat Crane Company.

If the jury imposed liability upon the unions on the theory that Pineapple was forced to cease doing business with Goodat Crane Company, as it might have under the instructions, the judgment below must be reversed.

With respect to the "various trucking companies" mentioned in the instruction, the evidence does not support the theory that Pineapple was forced to cease doing business with any of them. There was testimony by Agent Gradel of the Portland-Pendleton Motor Transport Company that not only was there no cessation of business, but that *business between the two had never commenced*. (TR 586-7.) With respect to Consolidated Freightways, there was testimony from its Manager centers that negotiations were broken off *because of an insufficiency of equipment*. (TR 1007.) This testimony was corroborated by Botley, an official of Pineapple, who said that Consolidated *did not want to make a one-way haul* (TR 1034-5), *and claimed it had insufficient equipment*. (TR 1163.) There was also uncontradicted evidence that the Nevada Fast Freight Trucking Company *had*

insufficient equipment and consequently did not choose to do business with Pineapple. (TR 1034-5, 1163.)

The second portion of this important instruction is as follows:

“Similarly, if plaintiff has established by a preponderance of the evidence that the International, by and [1714] through its officers and agents and Local 8, and Local 8 itself, through its officers, agents and members, or either the International or Local 8 induced or encouraged the employes of either the Goodat Crane Company, the Portland-Pendelton Motor Transport Company, Consolidated Freightways, Oregon-California-Neveda Fast Freight or any other trucking lines doing interstate business from The Dalles, Oregon, to engage in a concerted refusal in the course of their employment to refuse to transport, handle, work on or perform any services in connection with plaintiff’s cargo or with the object of the forcing or requiring either Goodat Crane Service or any of the trucking lines, or both, to cease doing business with the plaintiff, and you further find that as a direct and proximate result thereof plaintiff sustained damage to its business and property, plaintiff would be entitled to recover.” (TR 1425-6.)

This instruction proceeds upon a theory which is precisely the opposite of, and is inconsistent with, the former portion of this instruction. It purports to make Pineapple the primary employer and the Goodat Crane Company, the Portland-Pendleton Motor Transport Company, Consolidated Freight-

ways, Oregon-California-Nevada Fast Freight, or any other trucking lines doing interstate business from The Dalles, Oregon, secondary employers. This inconsistency demonstrates that the Court was having difficulty in determining where there were primary and where there were secondary employers. This inconsistency alone requires a reversal, for it places upon the jury the burden of determining, along with the facts, the complex legal question of which of several employers was a primary employer and which of several employers was a secondary employer.

Furthermore, the Court's instruction to the effect that Pineapple is a primary employer contradicts the Court's earlier ruling that there was no primary dispute involving Pineapple.

The fundamental error referred to above, namely, that appellants' contention that primary activity was directed against The Dalles, was ignored by the Court, should be taken into account at this point in order to demonstrate that if appellants' hypothesis were accepted, the incidental effect of forcing employers to cease doing business with Pineapple, would be a legitimate objective, not violative of Section 303(a). Also, if appellants' contention is accepted, as would appear to be borne out in the above instruction, namely, that primary activity was directed against Pineapple in order to assure the unloading of the barge under union conditions, then the inducement of employees of other employers not to cross the picket line does not constitute a violation of Section 303(a).

With respect to the Goodat Crane Company, appellants contend that the evidence does not disclose a concerted refusal of the employees of Goodat. (TR 882.) A person's refusal to cross a picket line does not show an inducement or encouragement toward concerted activity. (*N.L.R.B. v. International Rice Milling Co.*, 341 U.S. 665.) The Court correctly instructed that such inducement or encouragement could not be shown after the crane was purchased by Pineapple. The Court's instructions, however, did not point out that under the prior lease arrangement the crane operator might have been an employee of Pineapple rather than of the Crane Company.

Did the jury impose liability upon the unions because of the inducement or encouragement of "concerted refusal" on the part of the crane operator? If so, the judgment below must be reversed.

With respect to the trucking companies mentioned in the above instruction, there was no evidence of a Section 303(a) violation. The evidence shows that no employees of Portland-Pendleton Motor Transport Company were induced or encouraged to engage in a concerted refusal. The only evidence is to the effect that the *employer* was approached. (TR 587.) Moreover, the evidence discloses that there was no cessation of business, for *a business relationship was never commenced*. (TR 586-7.) With respect to Consolidated Freightways, the evidence does not reveal inducement or encouragement of its employees to engage in a concerted refusal. The only evidence is to

the effect that Consolidated Freightways refused to deal with Pineapple *because its equipment was insufficient* (TR 1007) and therefore broke off negotiations (TR 1034-5, 1163). With respect to the Oregon-California-Nevada Fast Freight, the only evidence was that this company refused to deal with Pineapple *because of insufficient equipment*. (TR 1034-5, 1163.)

Both portions of the instruction set forth above, when read together, not only presented a confused, inconsistent picture to the jury which did not establish for it a secondary boycott situation in which a neutral employer is exposed to pressure in order to force the primary employer to come to terms with the union, but they also seem to establish a rule far beyond the scope of Section 303(a), namely, that if there was activity at The Dalles which prevented the unloading of the barge under other than union conditions, there was a 303(a) violation.

F. Any "secondary" activity at The Dalles was incidental.

It has been shown above that there was primary activity at The Dalles conducted in order to secure the unloading of the pineapple barge by union members and under union conditions. To the extent that the picketline activity had the *effect* of preventing the unloading of this barge, it is not to be equated with an unlawful 303(a) *objective* of inducing and encouraging the employees of neutral employers to cease doing business with the primary employer. Appellants contend herein that the secondary boycott provisions contained within Section 303(a) are to be

applied in this case the same way, despite the violence revealed in the evidence, as it would be applied if the damage to Pineapple resulted from the patrolling of a single, peaceful picket. If the inducement and encouragement of the employees of neutral employers resulted from peaceful picketing, it would be nonetheless a secondary boycott if the essential elements of Section 303(a) were otherwise present. Appellants herein contend that the *effect* of successful primary activity is not the same as an unlawful dominant *objective* of requiring secondary employers to cease doing business with primary employers.

G. Conclusion.

Section 303 of the Taft-Hartley Act had as its target certain specific types of union pressure which have been traditional in labor's arsenal. Section 303(a) was drafted, as has been demonstrated, in order to reach labor's historic use of the secondary boycott. In order to impose liability and damages upon a union organization under the terms of Section 303(a) it is necessary that the conduct charged and proven be strictly within the terms of this section. Appellants contend that that has not been the case here.

This is not to suggest that appellee might not have had other remedies available to it. It is not herein asserted that appellee's claim for damages ought to go wholly uncompensated. Appellants do contend—and most seriously—that appellee should not recover under the secondary boycott provisions of Section

303(a) without having established that a secondary boycott exists.

IV.

THE FAILURE TO MINIMIZE DAMAGES REQUIRES A REVERSAL OF THE JUDGMENT.

The stupendous verdict rendered in this case—for over \$200,000—represents every penny which Pineapple asked for. Yet the record is clear that Pineapple consciously and deliberately passed up and ignored ample opportunity for minimizing its damages.

That it had a duty to take reasonable steps to prevent or reduce its damages is unquestioned. *United States v. Brookridge Farm*, 111 Fed. 2d 461; *John S. Doane Company v. Martin*, 164 Fed. 2d 537; *Texas Company v. Christian*, 177 Fed. 2d 758; *Isthmian SS. Co. v. Jarka Corp.*, 100 Fed. Supp. 856.

The bulk of Pineapple's claimed damage occurred at the San Jose plant of its Barron Gray Division. This plant was engaged in the canning of fresh fruits and vegetables; one of its principal products was canned fruit cocktail, an ingredient of which was pineapple. (TR 937.) It was the delay in the delivery of the pineapple on the barge here in question that was claimed to have resulted in "excess factory cost" of almost \$150,000. (TR 948-9.) But the record is clear that this loss could either have been avoided or at least substantially minimized.

In order to manufacture this fruit cocktail, the Barron Gray Division normally purchased fruits other than pineapple from fruit growers a few months before the packing season began. (TR 959-960.) In 1949, despite the fact that it had knowledge as early as May 1st that there was a strike in the Islands (TR 958), and that its contracts with the growers permitted cancellation "in the event of labor difficulties" (TR 959, 1292-3), the Company continued to purchase and accept fresh fruit from the growers. This it did all through the summer of 1949 until as late as the middle of September, after the strike with its interruption of Hawaiian shipping had been in effect for over three and one-half months and at a time when it was quite uncertain that any pineapple at all would be delivered (TR 963).

The Company simply chose to run the risk of this tremendous loss despite the fact that it had a clear and reasonable opportunity to avoid it. This, in effect, was the admission of its own assistant treasurer.

"Q. You could have cancelled all of the fruit which is the subject of this \$142,000, couldn't you?

A. Yes.

Q. You didn't choose to do it, did you?

A. No." (TR 968.)

Clearly, a reasonably prudent businessman would not have continued to purchase fresh fruit in the face of the strike, especially since his contracts permitted him to withdraw from the obligation to purchase. Any loss sustained as a result of such con-

tinued purchase resulted proximately not from the alleged conduct of appellants, but from the failure of Pineapple to exercise sound business judgment to keep its losses at a minimum.

Texas Co. v. Christian, 177 F. 2d 579, at 761 (1949).

With the fresh fruit accumulating on its hands during the summer of 1949, Pineapple faced various alternatives. As indicated, it could have but did not cut down upon its purchases. Furthermore, it could have made efforts to obtain other pineapple to put into its fruit cocktail. Non-Hawaiian pineapple was available to it. (TR 1288-90.) While its contention that such pineapple wasn't quite as good as Hawaiian pineapple may be true, it is submitted that it was unreasonable for the Company to continue to accept fresh fruit while refusing to use non-Hawaiian pineapple. If it intended not to use non-Hawaiian pineapple, it should not have continued to accept other fresh fruits for the duration of the strike.

Or, the Company could have put up the other fruits without pineapple as either a fruit mix or separately as canned pears, apricots, grapes, etc. (TR 970-971) and sold them under any one of 100 different labels (TR 969-70). It had in past years put up separate quantities of individual fruits and had a market for them. (TR 1155.) Although this method of minimizing its damages was also available to it, it did not consider it. (TR 981.)

Instead—and this is the point at which the overwhelming bulk of its damages occurred—it put up

the fruits in a form which it knew they could not sell (TR 1292) and stored them in that condition until the pineapple finally arrived, and then reprocessed the fruits and the pineapple into fruit cocktail. Its principal damages arose from the cost of the cans and the labor that was required in this extra, and as indicated above, unnecessary, operation. As was said in another case, Pineapple's

"conduct in dealing with these shipments and making claims for loss * * * was obviously strategic, and stemmed from the defendant's refusal to accede to [its] demand that [the pineapple be unloaded under non-union conditions at The Dalles] as well as from [its] interest in enhancing [its] alleged damages for the purposes of this law suit." (*American Can Co. v. Russellville Canning Co.*, 191 Fed. 2d 38 at 55.)

Even if the damages for this operation are attributable to these appellants, it is clear that the amount recovered was in excess of what Pineapple was entitled to. Included in the recovery was the cost of some 138,000 cases of cans which were used for storing the fruits until the Pineapple arrived. But this figure included almost 25,000 cases which were put up on September 26th and 27th, and almost 17,000 cases which were put up on September 28th. The barge did not arrive at The Dalles until the 26th and clearly the damages for the 26th and 27th could not be attributable to the appellants, and it is unlikely that the damage for the 29th could. Thus, more than 25 per cent of the loss would have occurred whether or not the barge was unloaded on the 26th

of September, the very day that it arrived at The Dalles.

All of these factors, which should have substantially reduced the amount of recovery, were ignored by the jury and, as indicated, every last penny prayed for was recovered.

This is not defensible and is explicable only by the passion and the prejudice which the record in this case must have aroused. However, passion and prejudice cannot take the place of evidence and no matter how sympathetic the jury might have been to the plaintiff, it had no right to award it damages except for such losses as it suffered as a proximate result of appellants' unlawful conduct. To the extent that the verdict represents an assessment of damages in excess of the amount which the rule of law permits, it must be set aside.

Or this Court may, by its remittitur, reduce the amount of damages. (*United States v. Brookridge Farm*, 111 F. 2d 461, 465; *Texas Co. v. Christian*, 177 F. 2d 759, 762.

For the foregoing reasons, the judgments below against appellant unions must be reversed.

Dated, San Francisco, California,

July 29, 1953.

Respectfully submitted,

GLADSTEIN, ANDERSEN & LEONARD,

By NORMAN A. LEONARD,

Attorneys for Appellants.



In the United States
Court of Appeals
for the Ninth Circuit

INTERNATIONAL LONGSHOREMEN'S &
WAREHOUSEMEN'S UNION (CIO) and
INTERNATIONAL LONGSHOREMEN'S &
WAREHOUSEMEN'S UNION, LOCAL 8,
Appellants,

vs.

HAWAIIAN PINEAPPLE COMPANY, LTD.,
a corporation,
Appellee.

HAWAIIAN PINEAPPLE COMPANY, LTD.,
a corporation,
Appellant,

vs.

MARTIN E. ADEN, et al.,
Appellees.

On Appeal from the United States District Court
for the District of Oregon

Brief for Appellant Hawaiian Pineapple Company, Ltd.

KRAUSE & EVANS
GUNTHER F. KRAUSE
DENNIS LINDSAY
GERALD H. ROBINSON
916 Portland Trust Building
Portland 4, Oregon
Attorneys for Appellant
Hawaiian Pineapple Company, Ltd.

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PAUL P. O'BRIEN
CLERK

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No. 13673

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INTERNATIONAL LONGSHOREMEN'S &
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MARTIN E. ADEN, et al.,
Appellees.

On Appeal from the United States District Court
for the District of Oregon

Brief for Appellant Hawaiian Pineapple Company, Ltd.

JURISDICTIONAL STATEMENT

This is an appeal from that part of a judgment of the District Court for the District of Oregon entered on July 31, 1951, upon a jury verdict, against the plaintiff-appellant Hawaiian Pineapple Company, Ltd. (hereinafter referred to as "Hapco") and in favor of 99 individual defendants-

appellees (Tr. 137-141) and from an order, entered September 8, 1952, by said District Court denying Hapco's motion for a partial new trial (Tr. 148-149).

The jurisdiction of this Court over the appeal rests upon 28 U.S.C.A., Sec. 1291, by reason of a notice of appeal, filed October 7, 1952 (Tr. 178-179).

The jurisdiction of the District Court rests upon Sec. 303 of the Labor-Management Relations Act, 1947 (hereinafter referred to as the "Act"), 61 Stat. 158, 29 U.S.C.A.

(Supp. 1952), Sec. 187¹, and upon 28 U.S.C.A., Sec. 1332 (Diversity of Citizenship).

Such jurisdiction stems from admissions and contentions in the Pre-Trial Order entered by the District Court and from proof adduced at the trial:

(1) That admittedly Hapco is a Hawaiian corpora-

¹ Sec. 303 provides in part:

"(a) It shall be unlawful, for the purposes of this section only, in an industry or activity affecting commerce, for any labor organization to engage in, or to induce or encourage the employees of any employer to engage in, a strike or a concerted refusal in the course of their employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services, where an object thereof is—

(1) forcing or requiring any employer or other self-employed person to join any labor or employer organization or any employer or other person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person; . . .

(b) Whoever shall be injured in his business or property by reason of any violation of subsection (a) [of this section] may sue therefor in any district court of the United States subject to the limitations and provisions of section 301 hereof without respect to the amount in controversy, or in any other court having jurisdiction of the parties, and shall recover the damages by him sustained and the cost of the suit."

tion growing and shipping pineapple to the United States mainland and to foreign countries for sale (Tr. 50).

(2) That admittedly the defendant International Longshoremen's & Warehousemen's Union (CIO) (hereinafter referred to as "International") is a "labor organization"² composed of affiliated local unions (Tr. 50-51) and the defendant International Longshoremen's & Warehousemen's Union (Local 8) (hereinafter referred to as "Local 8") is a labor organization composed of individual members doing longshore and dock work in certain ports of the State of Oregon and the Columbia River.

(3) That admittedly Hapco is engaged in Interstate

² Sec. 501 (3) of the Act provides, in part, that the term "labor organization" shall have the same meaning as when used in the National Labor Relations Act, as amended, in Sec. 2 (5) of which a "labor organization" is defined as "any organization of any kind, or any agency or employee representation committee or plan, in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work." (29 U.S.C.A. (Supp. 1952), Sec. 152(5)).

Commerce and the present action involves an "industry or activity affecting commerce"³ (Tr. 50, 157, 1050).

(4) That allegedly the defendants International and Local 8 engaged in various activities in violation of Sec. 303 (a) (1) of the Act and that Hapco was thereby injured in its business and property (Tr. 57-63).

(5) That admittedly at the commencement of the action Hapco was a citizen of Hawaii and the individual appellees were citizens and residents of states or territories of the United States other than Hawaii, and that the amount in controversy exceeds the sum of \$3,000.00 exclusive of interest and costs (Tr. 50, 51-52).

³ The term "industry affecting commerce" is defined in Sec. 501 (1) of the Act to mean "any industry or activity in commerce or in which a labor dispute would burden or obstruct commerce or the free flow of commerce." The term "commerce" is defined by Sec. 2 (6) of the National Labor Relations Act, as amended, to mean "trade, traffic, commerce, transportation or communication, among the several states, or between . . . any Territory of the United States and any State . . ." (29 U.S.C.A. (Supp. 1952), Sec. 152 (6)).

STATEMENT OF THE CASE, PRESENTING QUESTIONS INVOLVED

This appeal arises from an action brought by Hapco to recover damages for injuries to its business and property allegedly sustained by reason of the activities of International, Local 8 and 99 individual appellees in boycotting and preventing the delivery of a cargo of pineapple which Hapco was shipping from Honolulu, Territory of Hawaii, to processors of fresh fruit in California (Nature of Proceedings, Pre-Trial Order, Tr. 54).

The action was based on the ground that the defendants engaged in various specified activities, pursuant to a conspiracy, which constituted a violation of Sec. 303 (a) (1) of the Act by the defendant labor organizations, and were tortious acts under the common law⁴ (Tr. 57-61).

The action was tried before a jury who returned a verdict of \$201,274.27 in favor of Hapco and against International and Local 8. The jury, however, returned a verdict in favor of the individual appellees (Tr. 136).

In instructing the jury, the District Court refused Hapco's request to submit the issue—raised by the Pre-

⁴ The activities of the defendant labor organizations were also alleged in the Pre-Trial Order to be in violation of Sec. 303 (a) (4) of the Act, but this charge was not submitted to the jury (Tr. 57-58).

Trial Order and supported by the proof—of the common law liability of the individual appellees as a result of their activities, separate and apart from any question of their liability as co-conspirators with International and Local 8. Instead, the District Court over Hapco's objection instructed the jury that, if neither International nor Local 8 was found liable, a verdict should be entered in favor of all the individual appellees; that only if one or both of the defendant labor organizations were found liable could the jury consider the liability of the individual defendants; and that an individual appellee could be liable only if he was a member of the conspiracy between the defendant labor organizations and the individual appellees or did any act in furtherance of such a conspiracy knowing of the common design and with the purpose of aiding and abetting it (Tr. 1435-1440).

After the jury returned its verdict in favor of the individual appellees, Hapco thereafter duly moved for a partial new trial on the sole issue of the common law liability of the individual appellees, or any of them, to Hapco as a result of their unlawful activities and to set aside the verdict and judgment insofar as they related in any way to the liability of individual appellees to Hapco (Tr. 142-

145). This motion was denied in a written opinion by the District Court (Tr. 148-177)⁵.

Accordingly, the questions raised on this appeal are (1) whether the issue of the common law liability of the individual appellees, separate and apart from any liability as co-conspirators with International and Local 8, should have been submitted to the jury for their determination; (2) whether prejudicial error to Hapco resulted from the District Court's instructions to the jury on the liability of

⁵ The only reference to Hapco's motion for a partial new trial in the twenty-eight-page opinion by the District Court was as follows:

"Before dealing with defenses, it is well at this point to dispose of plaintiff Pineapple's motion for new trial upon the ground that the individual defendants could have been held upon the same ground and the same evidence as were the unions. Pineapple here repeats the same error as was made by the unions in contending that the verdicts were inconsistent.

It is true that the Court may not have accurately stated the elements of liability at common law as to the individuals. But no exceptions were taken to the instructions upon this ground. The subject is highly complicated and the question of whether the state law or a common law adopted by the federal enactments applies is extremely nebulous. Certainly, the ground chosen by Pineapple for objection and exception cannot be maintained. The jury found against Pineapple on a fair statement of the common law. This motion for new trial is therefore denied." (Tr. 165)

the individual appellees; and (3) whether Hapco is entitled to a partial new trial on the sole issue of the common law liability of the individual appellees.

Inasmuch as the determination of whether a particular issue should have been submitted to the jury depends upon whether it was raised in the pleadings or the Pre-Trial Order and supported by evidence, there is set forth hereafter a summary of pertinent portions of the Pre-Trial Order and of the evidence.

A. The Pre-Trial Order

After extended pre-trial conferences (Tr. 183-348), the District Court entered a Pre-Trial Order which by its terms superseded the pleadings (Tr. 76). This Pre-Trial Order set out the contentions of the parties and the issues raised thereby.

Hapco contended that International, Local 8 and the individual appellees engaged in a conspiracy to commit various unlawful acts as follows:

"6. That the defendant International, acting through its officers and agents and Local 8, and the defendant Local 8, acting through its officers, agents and members, and the individual defendants combined and conspired between August 22, 1949 and October 30, 1949 to boycott plaintiff's cargo of pineapple, to injure and damage plaintiff's business and property, to prevent the plaintiff from unloading or causing to be

unloaded its cargo of pineapple and from shipping or having the same shipped by interstate common carriers from the port of The Dalles, Oregon to San Jose and other points in California, and to violate Sections 303 (a) (1) and 303 (a) (4) of the Labor Management Relations Act of 1947, and that pursuant to said combination and conspiracy and in furtherance thereof the defendants engaged in and induced and encouraged the employees of employers engaged in unloading said barge and employees of employers engaged in transporting freight by rail and by truck between the states of Oregon and California to engage in a concerted refusal in the course of their employment to refuse to transport, handle or work on or perform any services in connection with plaintiff's cargo, with an object of forcing and requiring plaintiff and Isleways, Ltd. to cease doing business with said employers and with persons in the State of California to whom said cargo was being shipped, and other states, and of forcing and requiring said employers and persons to cease using, handling, transporting or otherwise dealing with plaintiff's pineapple and to cease doing business with plaintiff and with Isleways, Ltd.; and with the further object of forcing and requiring the port of The Dalles to assign the particular work of unloading said barge and of loading the cargo on railroad cars and trucks to members of defendant Local 8 rather than to its own employees; . . ." (Contention 6, Tr. 57-58).

In succeeding paragraphs, Hapco alleged various unlawful acts committed by the defendants: inducing breach of contracts between Hapco and the Port of The Dalles,

interstate truck carriers, and a crane company (Contention 6 (a), Tr. 58); inducing employees of interstate truck and rail carriers and the crane company to engage in concerted refusal in the course of their employment to perform any services on Hapco's cargo (Contention 6 (b), Tr. 58); picketing the terminal of the Port of The Dalles commencing September 26, 1949 (Contention 6 (c), Tr. 58); and rioting against Hapco as follows:

"(d) Defendants on September 28, 1949 at about the hour of 2:00 P.M., forcibly and violently overran and thrust aside the police officers of the City of The Dalles who were on duty at the entrance to the terminal of the port of The Dalles and staged a riot upon the docks and in the warehouses of the port of The Dalles in which more than 100 members of the defendant union Local 8 participated; said defendants, many of them carrying knives, cargo hooks, 2x4s, axes and crowbars and other dangerous and deadly weapons, beat and injured employees of the plaintiff and other persons and damaged and wrecked trucks and a derrick belonging to or leased by plaintiff and damaged and threw into the Columbia River approximately 409 cases of pineapple, each case consisting of six No. 10 cans, which pineapple was wholly lost to the plaintiff; said defendants further cut and destroyed the hawsers holding the said barge to the dock and set the barge adrift." (Contention 6 (d), Tr. 58-59).

Other acts alleged were patrolling the streets of the City of The Dalles to further dissuade and intimidate employees of employers present at the terminal of the Port of The

Dalles from further discharging Hapco's cargo (Contention 6 (e) Tr. 59); and the picketing of the terminal again from October 20 until October 27, 1949 (Contention 6 (f) and (g), Tr. 59-60).

It was alleged that the foregoing acts caused employees of the Port of The Dalles, of interstate truck and rail carriers, and of the crane company to concertedly refuse on September 26, 1949, and thereafter, to perform any services in connection with Hapco's cargo, and also caused Hapco's employees to concertedly refuse in the course of their employment to perform any services from September 28 until October 19, 1949, and from October 20 until October 27, 1949. These acts allegedly forced Hapco to discontinue discharging its cargo and transporting the same to California between September 26 and October 30, 1949; required it to cease doing business with various processors of fresh fruits in California; caused the crane company to breach its agreement with Hapco and to cease doing business with it from September 26, 1949 on; and caused the Port of The Dalles to refuse to perform its agreement with Hapco and allow it to discharge its cargo from September 28 until October 19, 1949, and from October 20 until October 27, 1949 (Contention 7 (a), (b) and (c), Tr. 60-61).

As the direct and proximate result of the above activities, Hapco contended that it was injured in its business and property and sustained damages in the amount of \$234,-

280.29, which claimed damages were thereafter specified in detail as to their nature and amount (Contention 8, Tr. 61-63).

In response, the two labor organizations and the individual appellees in their contentions denied all of Hapco's contentions that any of the defendants, singularly or in concert with each other, performed any of the alleged acts (Contentions 6, 7, 13, Tr. 63-64). They also asserted that Hapco's contentions did not state a claim upon which relief could be granted against the individual appellees, in that Section 303 of the Act did not authorize actions for damages against individuals (Contention 16, Tr. 65).

From the contentions of each of the parties, the Pre-Trial Order set forth the following "Issues", among others, to be determined at the trial:

"(5) Was there any conspiracy to injure the plaintiff in its business, as alleged, which said conspiracy was participated in by the defendant International, the defendant Local, the defendant individuals or any of them?" (Tr. 66)

acts and conduct alleged by plaintiff?" (Tr. 67)
(Italics supplied)

"(9) If so, did the alleged acts and conduct cause the consequences claimed by plaintiff?" (Tr. 67)

"(10) If so, were such acts and conduct the proximate cause of damages alleged to have been sustained by plaintiff?" (Tr. 67)

"(11) If so, what was the amount of the damages that plaintiff allegedly sustained?" (Tr. 67)

"(16) *Were all of the alleged acts allegedly done or performed by any of the defendants, either singularly or collectively, violative of any right or rights of the plaintiff?*" (Tr. 67) (Italics supplied)

"(18) Was there any conspiracy to injure the plaintiff in its business, as alleged, which said conspiracy was participated in by the defendant International, the defendant Local, the defendant individuals or any of them?" (Tr. 68)

"(22) (a) Did the defendants engage in a combination and conspiracy to boycott plaintiff's cargo and to injure its business, etc., and engage in various acts and conducts in furtherance thereof as alleged by plaintiff?" (Tr. 68)

"(23) If so, did the alleged combination and conspiracy and the acts and conduct in furtherance thereof cause injuries to plaintiff's business and property?" (Tr. 68-69)

"(24) If so, did such injuries cause plaintiff to suffer damages in the sum of \$234,280.29, together with reasonable attorney's fees in the amount of \$25,000.00?" (Tr. 69)

B. The Evidence Relating⁶ to Individual Appellees.

In support of its contentions, Hapco adduced proof at the trial, which was substantially uncontroverted insofar as the individual appellees were concerned, and from which the jury would have been warranted in finding the facts hereafter summarized.

[The Background]

The so-called "Great Hawaiian Dock Strike"⁷ was the background to the present action and the activities of the individual longshoremen. The strike was called by International and its affiliated local union in Hawaii against the stevedoring companies and commenced May 1, 1949 (Tr. 1017). Because of it, Hapco was thereafter unable to export pineapple through its usual method of using ocean freighters (Tr. 1018).

Faced with orders for 68,300 cases of pineapple from processors of fresh fruit in California (Tr. 912-913, Exhibit

⁶ It should be noted that the factual picture hereinafter set forth is incomplete, in that evidence relating to the activities of International and Local 8 is not discussed but will be considered in connection with their appeal.

⁷ Generally, see Brissenden "The Great Hawaiian Dock Strike", 4 Labor Law Journal 231 (April, 1953).

188) and requiring pineapple at its own plant at San Jose, California, Hapco in August, 1949, chartered ocean-going barge YFN from the United States Navy (Tr. 1014-1015, 1018). The barge was loaded by employees of Isleways, Ltd., a wholly owned subsidiary of Hapco, at the latter's terminal in Honolulu, with a cargo of approximately 115,000 cases of pineapple worth more than \$680,000.00 (Tr. 915, 918-919, 1014, 1015, 1091). The barge was towed across the Pacific Ocean by an ocean-going tug owned by Isleways, Ltd., for delivery of the cargo in California to these processors and to Hapco's own plant (Tr. 1018, 1019-1020).

There was no picketing, disturbances or labor difficulties of any kind in connection with the loading and dispatching of the barge (Tr. 1016, 1017). Hapco and Isleways were not engaged in any dispute with their own employees and were not parties to the dispute between the stevedoring companies and International and its affiliated local union (Tr. 1015-1018).

When it proved impossible to unload the barge in the San Francisco Bay area or at Tacoma, Washington, the barge was towed from the latter port up the Columbia River to the terminal of the Port of The Dalles at The Dalles, Oregon, lying approximately 90 miles east of Portland (Tr. 1020-1025). The barge arrived at The Dalles on the evening of Saturday, September 24 (Tr. 1025).

Before the arrival of the barge, Hapco had entered into an agreement with the Port of The Dalles, a municipal corporation, whereby the Port undertook to discharge and unload the pineapple from the barge and to load it upon railroad cars and trucks for shipment to California (Tr. 474-483, 496-500, 1024). Hapco had also entered into an agreement with the Goodat Crane Service for the lease of a crane and an operator to lift the pineapple from the barge to the Port dock (Tr. 883, 1040). These agreements were made with a view to commencing the unloading of the pineapple from the barge on September 26 (Tr. 1041).

[Pre-Riot Activities]

On September 23rd, before the arrival of the barge at The Dalles, appellee Meehan (the representative of International in Oregon) called on some of the Commissioners of the Port of The Dalles for the purpose of forcing the Port to give up its agreement with Hapco to unload the barge (Tr. 477-480, 500-502). Labeling the barge "hot cargo", Meehan, when told that the Port was an open one, replied, "You wouldn't tie up a barge load of dynamite, would you?" (Tr. 478). Meehan threatened that the port would be picketed (Tr. 478-501).

On September 25, the crane leased by Hapco was brought to The Dalles (Tr. 876, 883). As it was being

assembled, a number of longshoremen, who had been standing near the entrance to the Port dock, came over to tell Goodat's employees that they had better not take the crane out on the dock if they intended to unload some "hot pineapple" because "it is liable to melt the boom off, and it won't be healthy for you." (Tr. 879). Thereafter, when the owner of the crane was threatened at his home by two men who identified themselves as from "the Hawaiian pineapple job" at The Dalles, he terminated the lease arrangement and Hapco was forced to buy the crane (Tr. 885-886, 1041).

On September 26, Meehan, in the company of appellee Baker (President of Local 8) and others, again called on some of the Commissioners of the Port (Tr. 480-485, 502-505). Displaying a belligerent attitude, he threatened the Port not to unload the barge, saying that he had 20 pickets there and could easily get 200 more (Tr. 481-482).⁸

As appellees Meehan and Baker had threatened, on September 26 various individual longshoremen together with a single Hawaiian from the local union affiliated with

⁸ Meehan also claimed that Local 8 had a contract with the Port of The Dalles because longshoremen from Local 8 had once unloaded an ocean-going vessel at the port in 1938 (Tr. 480-81, 504). However, the Commissioners were unable to find any such contract and testified that Meehan did not want to unload the barge but only wanted to prevent its being unloaded (Tr. 481, 504).

International in Hawaii, began to mass and picket at the entrance to the Port dock (Tr. 417, 506, 1254). The local manager of a truck line estimated there were from 75 to 100 longshoremen by the Port dock and around The Dalles on September 27 (Tr. 584).

[The Riot]

On Wednesday, September 28, at approximately 7:00 A.M., the Port began to unload the pineapple from the barge and to load it on two Hapco flat bed trucks (Tr. 507, 597, 614, 1038, 1043-1044). Involved in the unloading operation were the Port's own employees, and a superintendent, crane operator and truck drivers employed by Hapco (Tr. 507, 949-950, 1042, 1079).

Meanwhile, on Wednesday morning, in answer to an appeal by appellee Baker over the loud speaker at the Union Hall of Local 8 in Portland, admittedly at least 150 to 200 members of Local 8, including all of the appellees (except Sovolatenko), drove from Portland to The Dalles, a distance of some 90 miles, there to assemble before the entrance to the Port dock (Tr. 1275-1276, 52-54).⁹

By noon over 200 longshoremen were massed in a picket

⁹ Photographs of the dock and terminal of the Port of The Dalles are shown in Exhibits 69, 70 and 71. A blueprint of the dock will be found in Exhibit 182.

line before the entrance to the dock (Tr. 433-434, 506, 585).¹⁰ On duty to maintain order were eight special policemen and five or six regular police officers of the City of The Dalles (Tr. 596). The longshoremen were, according to an officer of nineteen and one-half years experience with the Oregon State Police, "rather loud and boisterous and in a quarrelsome mood to anyone that went through the line" (Tr. 432, 438). Every vehicle that went in and out of the Port dock was checked and every driver asked if he had any dealings whatsoever with Hapco. If not, the driver was given a slip saying that he had no connection with Hapco and was permitted to go onto the dock (Tr. 438-439, 548). Even one of the Port Commissioners driving off the dock was told by Meehan "you are doing something here that you will regret the rest of your life" (Tr. 507-508).

On hearing that Hapco had two large trucks waiting outside The Dalles to come in to the dock, four of the appellees went from the dock to meet Hapco's truck drivers. Their purpose was to persuade these employees to refuse to drive the trucks on to the dock. However, after receiv-

¹⁰ A visual picture of some of the massed pickets at the entrance to the Port dock may be obtained from Exhibits 47, 49 and 50, which show the scene at approximately 10:30 A. M., and from Exhibits 54 and 62 showing the same scene shortly after noon. (Notice the clock in the upper right hand corner of photographs.)

ing a clearance from their own A. F. of L., Teamsters local union, the drivers decided to proceed to the dock (Tr. 677-680, 695, 1098-1099, 1119, 1121-1122, 1125-1126, 1136, 1140-1141, 1143).

At about 2:00 P.M. these two large trucks, with their four drivers, came up to the entrance to the Port dock (Exhibit 42). A rock was thrown by the appellee Gillis through the windshield of one of the trucks and somebody yelled, "Let's get them" (Tr. 355-357, 441, 663, 1220). From then on, according to Sergeant U'Ren of the Oregon State Police "it was a riotous mob, screams and catcalls, and every foul name that they could use" (Tr. 441). As the second truck started through the gates leading onto the dock, the Assistant Chief of Police of The Dalles testified that the mob came "just like a wall" (Tr. 599). They pushed and shoved their way through the gate and through the policemen on duty, and rushed onto the dock (Tr. 356-360, 523, 599, Exhibit 34). Altogether a mob estimated at over 200, "all running more or less" went onto the dock, their yells sounding like a "terrific growl" to a Port Commissioner on the dock (Tr. 450-451, 509-510).

Some of the mob ran up to the last Hapco truck to enter the gate and cut its air line so as to lock its brakes. The two drivers were told by a man, who held a steel cargo hook up over his head, to "get out or we will kill you" (Tr. 666-669, 684). Each of the drivers was pulled out, brutally

beaten and kicked in the face and in the head until he finally agreed to go back to California. They were then made to back the truck off the dock (Tr. 668-669, 684-685, 366-368).

Others of the mob passed by the rear truck and ran up to the first Hapco truck (Exhibit 41). Again air hoses were loosened. The driver, who had gotten out, was hit on the head with a "hammer handle or something" and, after he was down, was kicked in the jaw (Tr. 688-689, Exhibit 37). The other driver was jerked out of the seat on his back and hit hard on his head. As he lay on the dock a longshoreman stood over him with a cargo hook saying, "I ought to crash this through your skull" (Tr. 524, 689, 1002, Exhibit 45). When told to "concentrate on the equipment" instead of the men, a gang of about 40 to 50 of the longshoremen tried to tip the truck over and were able to raise it four or five feet off of the dock but could not get it all the way over.¹¹ Others broke the headlights and pulled out the trucks' wiring (Tr. 364, 411, 509, 524-525, 526-527, 579).

Still others ran past the two trucks into a covered warehouse area on the dock. A carpenter foreman working on the dock estimated that 150 to 200 men ran in (Tr. 550). They grabbed 2x4s, 4x4s, steel bolts, all available sticks, and one man even went into the Coast Guard workshop and

¹¹ A dramatic picture of the mob of longshoremen trying to tip over Hapco's truck is shown on Exhibit 44.

came out with axe handles in both hands (Tr. 550, 564-565, 578-579, 646). They were screaming "Get the god-dam scabs" and seemed to a Coast Guard man on duty just like a "bunch of mad men" (Tr. 571, 578). When they reached the two Hapco flatbed trucks which had been loaded with pineapple from the barge, they ripped the canvas covering the cases of pineapple, slashed the ropes holding the cargo, dumped the pineapple off the trucks, threw a 4x4 through the windshield of one of the trucks, slashed at the tires and at the trucks themselves with an axe, and broke the fuel lines (Tr. 469, 486, 510, 527, 550-552, 564-565, 568, 581). All the while the men were shouting "no violence" (Tr. 468, 647-648).

After the mob had passed through the warehouse and reached the open space in the dock, where the crane was unloading the pineapple from the barge, they began to fight with all the port and Hapco employees engaged in this work. (Tr. 403-406). The supervisor of Hapco's trucks was set upon by 15 or 20 of the men, held and hit over the head with a 2x4, and then kicked in the face, ribs and stomach (Tr. 568, 1012). Three cameramen present were assaulted and their cameras smashed (Tr. 410-411, 529, 550-551, 648-651). As many men as possible gathered around the crane and tried up tip it over into the river. The engine of the crane was jimmied and smashed at with a crowbar and loose tools from the crane were thrown into the

river (Tr. 511, 528, 550, 570, 648). Cases of pineapple were tossed over the edge of the dock into the river as fast as the men could throw them (Tr. 528, 579, 648). The thick manila hawsers holding the barge to the dock were cut (Tr. 472, 511, 568)¹².

Various witnesses testified that the damage wrought by the rioting longshoremen was not the acts of various individuals acting alone but was done by "team work" All of the individual longshoremen did not engage in one act but spread out. All did damage at the same time. All seemed to know their job and all knew exactly what they were doing (Tr. 571, 574, 580, 660).

After being on the dock an estimated 25 to 30 minutes, the mob walked off the dock in an orderly way and assembled near the dock entrance (Tr. 369, 510, 560, 572, 698). Meehan addressed them saying that they were supposed to have been peaceful pickets but that "they had done a fine job." (Tr. 369-370, 461). Later the Mayor of The Dalles located Meehan and read him a riot proclamation (Tr. 460).

Admitted in evidence were three different motion pictures (Exhibits 74, 75 and 76), which were filmed at

¹² Two photographs (Exhibits 38 and 46) particularly show the scene at the open space in the dock while the longshoremen were still milling about.

various stages of the riot and present visual evidence in corroboration of the testimony of Hapco's witnesses. Arrangements will be made to have these motion pictures shown to the Court.

On the day following the riot some 200 to 300 longshoremen returned to The Dalles. Prevented by a temporary restraining order and a force of around 52 Oregon State policemen from picketing the Port of The Dalles dock, the longshoremen patrolled the streets of the city in mobs of 15 or 20, crowding people off of the sidewalks and generally terrifying the community (Tr. 443-445, 457, 461-463, 1042).

[The Results]

As a result of the riot, the Port of The Dalles was forced to discontinue the unloading of the barge (Tr. 486). Hapco's crane and trucks were out of commission from the damages they suffered during the riot and had to be repaired (Tr. 486, 686, 1038). However, it proved to be impossible to effect repairs to the crane until about ten days after the riot (Tr. 1040).

By that time, however, Hapco had sustained the largest element of its damage. Hapco's plant at San Jose, California, had previously purchased large quantities of perishable peaches, pears, and grapes to be mixed with cherries

and with pineapple from the barge in preparing and canning "fruit cocktail". To prevent the spoilage of these fresh fruits while awaiting the arrival of the pineapple, Hapco's plant had been forced to process and can them into a mixture known as "fruit mix" on successive days from September 27 until October 6 (Tr. 935-939). By October 7 all the fresh fruit had been processed and canned (Tr. 916). Inasmuch as there was no market for fruit mix (Tr. 938, 988-989, 995-996), Hapco was required to reprocess all of it after the eventual receipt of the pineapple from the barge in November so as to make fruit cocktail (Tr. 939, 941).

Extensive testimony was received concerning Hapco's costs of converting fruit mix into fruit cocktail, from which it was possible to compute the reprocessing costs involved by reason of the failure to receive pineapple by September 29th, the day on which pineapple would have been delivered at the plant had it not been for the riot (Tr. 938-949, 956-958, 990-991). There was also detailed testimony as to various items of damage or expense to Hapco caused by the activities of the individual longshoremen, such as the repairing of the trucks and the crane (Tr. 1056-1057), charter fees of the barge and its tug (Tr. 1051-1052, 1061), special police (Tr. 1060), lost cases of pineapple (Tr. 918-919, 1048), cut mooring lines (Tr. 1061),

medical and hospital bills of injured employees (Tr. 1066-1067), etc.¹³

[Individual Participants]

Twenty-two of the appellees¹⁴ were arrested, indicted by the Grand Jury, and convicted in the Circuit Court of the State of Oregon for the County of Wasco of the crime of Riot in violation of Section 23-801, Oregon Compiled

¹³ In view of the limited questions raised on this appeal, the concern has been to set forth the activities of the individual appellees and the general damage resulting therefrom. The specific items of damage and their amounts are, of course, questions of fact for determination by the jury.

¹⁴ Aden, Baker, Bantin, Bletch, Caramanica, Dollarhide, Foster, Howard E., Foster, Henry L., Goevelinger, Gayeski, Gillis, Hahn, Ingram, Kephart, Lambert, Montroy, Albaloni, alias Miller, Nielsen, Settje, Swanson, York and Zimmer (Exhibit 26).

Laws Annotated¹⁵, by pleading guilty to the indictment which charged, in part, that each of them:

"... and 100 or more other persons to the Grand Jury unknown, on the 28th day of September, 1949, in the County of Wasco, State of Oregon, then and there being, and said defendants and other persons then and there acting together and carrying dangerous weapons, namely, cargo hooks, iron bars, rocks, an ax, knives, clubs and sticks, and then and there encouraging and soliciting other persons participating with them to acts of force and violence, did then and there unlawfully, feloniously, routously, riotously and tumultuously assemble and congregate, without authority of law and in a manner adapted to disturb the public peace and excite public alarm; and did then and there unlawfully, feloniously, wilfully, routously, riotously and tumultuously use force and violence and

¹⁵ Section 23-801, O.C.L.A., provides:

"RIOT AND UNLAWFUL ASSEMBLY. Any use of force or violence, or any threat to use force or violence, if accompanied by immediate power of execution, by three or more persons acting together, and without authority of law, is riot. Whenever three or more persons assemble with intent, or with means and preparation to do an unlawful act, which would be riot if actually committed, but do not act towards the commission thereof, or whenever such persons assemble without authority of law, and in such manner as is adapted to disturb the public peace or excite public alarm, or disguised in a manner adapted to prevent them from being identified, such assembly is an unlawful assembly."

threaten to use force and violence, which threats were then and there accompanied with immediate power of execution, and on being so assembled and congregated, as aforesaid, the said defendants did then and there unlawfully, wilfully, routously and riotously trespass upon inclosed premises not their own, or either of them, namely, the premises of the Port of The Dalles, and did then and there unlawfully, routously, riotously and feloniously make an assault upon Don Higham, Eugene Hoard, Elvy Davis, Clarence Rosales and Raymond Curto, by then and there unlawfully and feloniously striking and beating them with said cargo hooks, iron bars, clubs and sticks; and did then and there unlawfully and wilfully assault and beat George Lindsay and Hugh Ackroyd; and did then and there unlawfully routously, riotously, feloniously, maliciously and wantonly destroy and injure the personal property of another, namely, 1 camera the property of George Lindsay; 1 camera the property of Hugh Ackroyd; 1 camera the property of Robert Lachenbach; 4 motor trucks, 1 power crane, 150 cases of pineapple and 3 manila hawsers, the property of Hawaiian Pineapple Company, Ltd., thereby then and there greatly terrifying, alarming and disturbing not only Ralph Q. Johnson and Clifford J. Deane, but many and all the good and peaceable people then and there passing and being, contrary to the Statutes in such cases made and provided, and against the peace and dignity of the State of Oregon." (Exhibit 26)

Thirty-eight other appellees admitted during the pre-trial conferences or in their depositions that they had gone

upon the dock of the Port of The Dalles during the riot on September 28¹⁶.

Of the remaining 36 appellees all except one were in The Dalles on September 28 at or near the Port dock¹⁷. Of this latter group four were involved in trying to induce Hapco's truck drivers to refuse to drive their trucks to the dock¹⁸.

¹⁶ Anderson, Barrett, Christiansen, Ferraris, Green, Hall, Hamlik, Jaschina, Geo. G. Jones, Geo. Jones, Kullberg, Mackey, Palmer, Piwarchuck, Raske, Joe Ross, Wm. Ross, Schafer, Simpson (Tr. 116), Streiff, Yazalino, Brown, Burk, Campbell, Drake, Ewing (Tr. 91), Flower, Hansen, Headrick, Helland, Harold Jones, Kasin, Larsen, Mazor, Pinkham, Roberts, Still, Tracas (unless otherwise noted, all references are to Tr. 52-54).

¹⁷ Alberg (Tr. 78), Atwood (Tr. 52, 78), Backstrom (Tr. 52, 79), Bailey (Tr. 79), Ezra Baker (Tr. 52, 79), Bjorge (Tr. 52), Carpenter (Tr. 52, 86), Chiles (Tr. 52, 86), Cule (Tr. 52, 86), Delk (Tr. 52, 87), Ede (Tr. 52, 89), Erickson (Tr. 52, 90), Hiltunen (Tr. 53, 98), Hjerpe (Tr. 53, 98), Hopp (Tr. 53, 99), Hoskin (Tr. 53, 99), Jennings (Tr. 53), Johnson (Tr. 53, 102), Lang (Tr. 53, 105), Laurer (Tr. 53, 106), Leichtman (Tr. 53, 106), Lemieux (Tr. 53, 107), Lowrey (Tr. 53, 107), O'Bray (Tr. 53), Olson (Tr. 53, 110), Perkins (Tr. 53, 110), Pilcher (Tr. 53, 111), Quist (Tr. 53, 112), Storseth (Tr. 53, 117), Roy Swanson (Tr. 53, 118), Thomas (Tr. 53, 118), Walter (Tr. 53, 119), Wojok (Tr. 53, 120), Yevtich (Tr. 53, 121), Young (Tr. 53, 121), Zeller (Tr. 53, 122).

¹⁸ Alberg (Tr. 1136), Backstrom (Tr. 1098-1099, 1112), Olson (Tr. 1121-1122), Storseth (Tr. 1136).

Six of the appellees testified in depositions to engaging in acts of assault and battery¹⁹, and seven others testified to seeing these acts or the results thereof²⁰.

Seven of the appellees testified to damaging or meddling with Hapco's property²¹. Only ten of the appellees admitted trying to tip over the truck²², though Exhibit 44 shows well over thirty individuals involved in this activity. One appellee admitted trying to tip the crane²³, and ten others admitted that they threw cases of pineapple into the Columbia River²⁴.

¹⁹ Bletch (Tr. 82), Caramanica (Tr. 85), Dollarhide (Tr. 88), Drake (Tr. 89), Lambert (Tr. 104), Montroy (Tr. 109).

²⁰ Aden (Tr. 78), Barrett (Tr. 81), Hamllik (Tr. 96), Kephart (Tr. 103), William Ross (Tr. 114), Settje (Tr. 115), Simpson (Tr. 116).

²¹ Bletch (Tr. 83), Drake (Tr. 89), Gillis (Tr. 94), Lambert (Tr. 105), Montroy (Tr. 109), Streiff (Tr. 118), Yazalino (Tr. 120).

²² Aden (Tr. 78), Dollarhide (Tr. 88), Drake (Tr. 89), Ewing (Tr. 91), Howard E. Foster (Tr. 93), Headrick (Tr. 97), Kephart (Tr. 103), Raske (Tr. 113), William Ross (Tr. 114), Swanson (Tr. 118).

²³ Jaschine (Tr. 101).

²⁴ Aden (Tr. 78), Bletch (Tr. 83), Ferraris (Tr. 91), Howard E. Foster (Tr. 93), Gillis (Tr. 94), Jaschine (Tr. 101), Kephart (Tr. 103), Montroy (Tr. 109), William Ross (Tr. 114), Swanson (Tr. 118).

SPECIFICATION OF ERRORS

1. The District Court erred in failing to submit to the jury the issue of the common law liability of the individual appellees to Hapco as a result of their unlawful activities, separate and apart from any issues of their liability as co-conspirators with International and Local 8.

2. The District Court erred in refusing to give to the jury the following instructions requested by Hapco:

"If you find from a preponderance of the evidence that certain individual defendants on or about September 28, 1949, in a riotous and tumultuous manner entered upon the dock of the Port of The Dalles and thereby placed in fear the employees of the plaintiff or of the Port of The Dalles, or of any other employers who were engaged in business with the plaintiff with an object of intimidating said employees and inducing them to refuse to perform their services for the plaintiff and other employers, and you further find that plaintiff sustained damages as a proximate result of such activities of the defendants, then your verdict should be for the plaintiff and against such defendants who participated, in such amount as will reasonably compensate it for the damage to its business and property." (Tr. 130)

* * *

"If you find from the preponderance of the evidence that on September 28, 1949, at about the hour of 2:00 p.m. certain individual defendants entered upon the dock of the Port of The Dalles and there in a loud, riotous and tumultuous manner assaulted cer-

tain employees of the plaintiff and damaged property and cargo belonging to the plaintiff and resisted the police officers of the City of The Dalles, all of the individual defendants who participated in the raid upon the dock are liable for all of the injuries and damages inflicted by any of the rioters if any such damages or injuries were inflicted." (Tr. 130-131)

* * *

"In the assessment of damages against the various defendants, you should consider the date as of which the defendant or defendants commenced the activities herein complained of, bearing in mind plaintiff's claim that its damages were sustained during a period commencing September 26, 1949. Accordingly, if you find from a preponderance of the evidence that each of the defendants, as a result of a conspiracy, engaged in the activities herein complained of and that plaintiff's losses, if any, commenced as of September 28, 1949, then each of the defendants would be liable for all of the damages, if any, sustained on and after that date regardless of whether he or they participated in the unlawful activities subsequent to that date. On the other hand, if you find from a preponderance of the evidence that there was no conspiracy, then the defendants may only be held liable for such damages, if any, that plaintiff sustained as a result of the activities of such defendant or defendants, bearing in mind the instruction which I have given you as to responsibility for the damages resulting from the riot, if any.

"I further instruct you that the plaintiff Hawaiian Pineapple Company can make only one recovery of the damages, if any, awarded to it in this action, and that if you should find for the plaintiff

against some of the defendants in one sum and against others of the defendants for another sum, the plaintiff would be only entitled to recover the larger sum awarded, and is not entitled to recover the total of the different sums awarded." (Tr. 133-134)

Hapco objected to the refusal of the District Court to give instructions that it was entitled to recover against the individual appellees, even if the Labor-Management Relations Act, 1947, was not involved in the action, because of the wrongful physical activities engaged in by the individual appellees in preventing Hapco from carrying on its business operations (Tr. 1450-1451).

3. The Distirct Court erred in giving the following instructions to the jury:

"Now, I want to mark that point. If you find under these instructions that I have just given you that neither of these unions is liable, neither the International nor the local, then you shall promptly enter a verdict in favor of all the defendants and against the plaintiff. That includes the individuals and everyone else. Now if you have, however, found liability under these instructions as to one or both unions, the International and local, then you may consider the liability of the individual defendants. In other words, you have to find the unions or one of them liable under the first part of the instructions before you can consider any individuals." (Tr. 1435)

* * *

"If you find from the evidence, that the individual defendants, [1726] among themselves or together with the Defendants International and Local 8, or either of the unions, conspired together to restrain trade and commerce between the Territory of Hawaii and any state of the United States, and to encourage or induce the employees of any employer by concerted action in the course of their employment to refuse to transport, handle or work upon a cargo of pineapple at The Dalles, Oregon, or to perform any services in connection therewith, with the object of forcing any employer or other person to cease doing business with any other person, and with the purpose of doing injury to the business or property of the plaintiff, and that said damage to business or property was actually accomplished, then plaintiff is entitled to recover against any individuals who, knowing of the unlawful intent, did any act in furtherance thereof and reasonably calculated to effect the object of the conspiracy." (Tr. 1436-1437)

* * *

"If you find there was no conspiracy involving any individual defendants, then your deliberations will be confined to the defendant unions alone in accordance with the [1728] previous instructions. If as to any individual defendant you find he was not a member of such conspiracy or did no act in furtherance of any conspiracy, knowing of the common design and with the purpose of aiding and abetting the common object, then you should find in favor of that defendant." (Tr. 1438-1439)

* * *

"If you find that the International, acting through its agents or officers, in the course of their employ-

ment, or through Local 8 and Local 8 itself, through its officers and [1729] agents or members, in the course of their employment, induced or encouraged employes of any employer to engage in a concerted refusal in the course of their employment to transport or otherwise handle any goods, articles or commodities, or otherwise handle, work on or perform services in connection with any goods, if one of the objects of the inducement and encouragement was to force or require any person to cease doing business with any other person, and as a direct result plaintiff was injured in business or property, then you may find liability against both the union defendants.

If you find only one is so liable, then you will find liability against such defendant.

If you do not so find, you will return a verdict for all defendants and against the plaintiff.

But if you find one of the defendant unions liable, or both of the defendant unions liable, and if on further consideration you find that the defendant union or unions against whom you have found liability further entered into a conspiracy, as above described, with the individual defendants, you will add to the verdict the names of all the individual defendants against whom you find." (Tr. 1439-1440).

Hapco objected to these instructions to the effect that there could be no verdict against the individual appellees unless the unions were also found liable, on the ground that the cause of action against the individual appellees was broader than a conspiracy to

restrain trade and was directed against and included the riot and the other activities the individual appellees engaged in to physically stop Hapco's business operations (Tr. 1450).

4. The verdict in favor of the individual defendants is contrary to the clear weight of the evidence and to law.

ARGUMENT

I.

THE ISSUE OF THE COMMON LAW LIABILITY OF THE APPELLEES FOR THEIR UNLAWFUL ACTS CAUSING DAMAGE TO HAPCO SHOULD HAVE BEEN SUBMITTED TO THE JURY SEPARATE AND APART FROM THE ISSUE OF THEIR LIABILITY AS CO-CONSPIRATORS WITH INTERNATIONAL AND LOCAL 8, AND THE FAILURE AND REFUSAL OF THE TRIAL COURT TO DO SO CONSTITUTED PREJUDICIAL ERROR.

A. Conspiracy not Gravamen of Hapco's Action.

Although Hapco contended in the Pre-Trial Order that International, Local 8, and the individual appellees combined and conspired to engage in various alleged unlawful acts (Tr. 57-58), it was not essential to recovery that such a conspiracy be proved.

A conspiracy may be pleaded and proved in order to connect a defendant with a transaction and to charge him with the acts and declarations of his co-conspirators without which he would not otherwise be implicated. See *International Longshoremen's & Warehousemen's Union v. Juneau Spruce Corp.*, 189 F. (2d) 177 (CA 9, 1951) *aff'd*, 342 U.S. 237; *Gabriel v. Collier*, 146 Or. 247, 255, 29 P. (2d) 1025, 1028 (1934).

It is fundamental, however, that a charge of conspiracy is not the gravamen of a complaint. Even if a conspiracy is not proved, a plaintiff may still recover damages against such of the defendants as are shown to be guilty of unlawful acts which directly result in damage to the plaintiff. *James v. Evans*, 149 F. 136 (CA 3, 1906); *Keller v. Commercial Credit Co.*, 149 Or. 372, 40 P. (2d) 1018 (1935); *Gabriel v. Collier*, *supra*; see *Howland v. Corn*, 232 F. 35, 40 (CA 2, 1916); *Ewald v. Lane*, 104 F. (2d) 222 (CA. D.C., 1939), *cert. denied*, 308 U.S. 568.

B. Common Law Liability of Appellees for Damages caused Hapco, Regardless of Conspiracy.

The evidence previously summarized is overwhelming and largely without dispute that on September 28, 1949, a mob of over 200 longshoremen, including the individual appellees to the extent therein set forth, stormed in a group

through the gates of the dock of the Port of The Dalles and staged a riot on the dock. During the course of this rioting, they injured and destroyed Hapco's property, assaulted and terrified its employees and other persons present, forced the Port of The Dalles to discontinue unloading the barge, and by thus preventing the delivery of needed pineapple to its California plant caused Hapco to incur heavy reprocessing expenses.

These unlawful acts directed against Hapco created in it a right of action under the common law against each and all of the persons who participated therein, for it is a well recognized and frequently applied principle that all persons who are responsible for or who participate in mob violence are liable for the necessary and natural consequences thereof. 46 Am. Jur., Riots and Unlawful Assembly, Sec. 18, p. 135; *Calcutt v. Gerig*, 271 F. 220 (CA 6, 1921); *Saunders v. Gilbert*, 156 N.C. 463, 72 S.E. 610 (1911).

That the individual appellees and others, who stormed onto the dock, constituted a rioting mob bent on wrecking their unlawful havoc on Hapco, is evident not only from the undisputed fact that twenty-two of the appellees admitted this by their plea of guilty to the indictment charging them with the Oregon statutory crime of Riot (Exhibit 26), but also from a previous decision of this Court, *Salem Mfg. Co. v. First American Fire Ins. Co. of New*

York, 111 F. (2d) 797 (1940), setting forth the common law authorities with respect to what constitutes a riot.

Even if the appellees and Hapco had occupied an employee-employer relationship to each other, the acts of violence committed by the appellees were unlawful and have always been so recognized by all courts. See, in Oregon, for example, *Wallace v. International Association*, 155 Or. 652, 663-664, 63 P. (2d) 1090, 1095 (1936); *Starr v. Laundry Union*, 155 Or. 634, 648-649, 63 P. (2d) 1104, 1109-1110 (1936). For damages suffered through violent means, it is further recognized that a plaintiff has a remedy at law for the unlawful torts committed against it. See, for example, *Restatement, Torts, Vol. IV*, p. 93.

For the injuries to its property and business as a result of the intentional and unjustified actions of the participating appellees, Hapco was entitled to be compensated in accordance with the general rules of damages, 46 Am. Jur., *Riots and Unlawful Assembly*, Sec. 19, p. 136. At the very minimum Hapco would have the right to be compensated for all of the actual out-of-pocket expenses it was forced to incur as a direct and proximate result of the unlawful acts of the appellees.

C. Issue of the Common Law
Liability of Appellees was
Raised by Pre-Trial Order
and Supported by Proof.

In its contentions in the Pre-Trial Order, Hapco alleged the various unlawful actions committed on September 28 by the appellees in violently entering the Port dock and staging a riot thereon with consequent damage to Hapco's employees and property (Tr. 58-59). Moreover, Hapco alleged the damages which it had sustained to its business and property by reason of these and other activities of the appellees (Tr. 61-63). These allegations were denied by the appellees (Tr. 63, 65).

Specifically framed as "issues" in the Pre-Trial Order were those of whether the individual appellees "engaged in the acts and conducts alleged" by Hapco (Issue 8, Tr. 67); and if so, whether such acts and conduct were the proximate cause of damage to Hapco and, if so, in what amount (Issues 9, 10, 11, Tr. 67). Also framed as "issues" were whether the appellees and International and Local 8 engaged in various acts and conduct in furtherance of a conspiracy to boycott cargo and injure its business (Issue 22 (a), Tr. 68); and, if so, whether the alleged conspiracy and acts in furtherance injured Hapco's business and property (Issue 22 (b), Tr. 68-69).

The Pre-Trial Order further raised as an issue to be determined at the trial whether the alleged acts of any of

the defendants, either singularly or collectively, were a violative of any rights of Hapco (Issue 16, Tr. 67).

On the issues thus posed, Hapco presented direct and un rebutted proof that the appellees engaged in unlawful acts by their riotous conduct of September 28 and that these unlawful acts were the direct and proximate cause of damage to Hapco's property and business. Yet the District Court, as will be shown, failed and refused to submit these issues, so raised and supported by the proof, to the jury.

In analyzing Hapco's contentions in the Pre-Trial Order, it should always be kept in mind that Hapco was charging International and Local 8 with violating Sec. 303 (a) (1) of the Act. Accordingly, Hapco's contentions were cast in terms of the many statutory requirements or elements necessary to bring a suit for damages under Sec. 303 (b) of the Act. Such contentions should not, however, be allowed to obscure the contentions made by Hapco and framed as issues at the trial that the appellees engaged in unlawful riotous activities on September 28 and thereby caused damage to Hapco. Admittedly, the Pre-Trial Order raised other issues as to the common law liability of the appellees for engaging in various other activities, besides the riotous acts of September 28, pursuant to a combination and conspiracy between the two unions and the individual appellees. The presence of these other issues in the action does not preclude Hapco from

having a narrower issue, which it had raised by the pleadings and supported by the proof, submitted to the jury.

**D. The Failure and Refusal of
the District Court to Submit
Separately the Issue of the
Appellees' Common Law Liability.**

Despite previous requests made to it by Hapco, the District Court failed to give any instructions whatsoever with reference to the common law liability of the individual appellees separate and apart from their liability as co-conspirators with International and Local 8 or either of them.

The only instructions of the District Court with respect to the liability of the individual appellees were given upon the basis that *only if* International or Local 8, or both, were found liable under the instructions given as to the liability of these labor organizations for violating the Act, could the jury then consider the liability of the individual appellees, and then *only if* the appellees or any of them entered into a conspiracy with the unions, or either of them (Tr. 1435, 1438, 1440).

Prior to the argument of the case and the instruction of the jury, Hapco had submitted one instruction in particular which would have squarely submitted to the jury the issue of the common liability of the individual appellees

for their riotous activities of September 28²⁵. In accordance with Hapco's intention of allowing the jury to pass directly upon the liability of each of the individual appellees, regardless of whether they were also engaged in a conspiracy among themselves or with the unions, the requested instruction made no reference to any conspiracy. Instead it simply presented to them the rule of law that the individual appellees who participated in the riotous activities of September 28 were liable for all of the damages they inflicted on Hapco.

In harmony with this requested instruction, Hapco had also submitted another requested instruction dealing with the assessment of damages against the various defendants

²⁵ The requested instruction provided:

"If you find from the preponderance of the evidence that on September 28, 1949, at about the hour of 2:00 p.m. certain individual defendants entered upon the dock of the Port of The Dalles and there in a loud, riotous and tumultuous manner assaulted certain employees of the plaintiff and damaged property and cargo belonging to the plaintiff and resisted the police officers of the City of The Dalles, all of the individual defendants who participated in the raid upon the dock are liable for all of the injuries and damages inflicted by any of the rioters if any such damages or injuries were inflicted." (Tr. 130-131)

(Tr. 133-134)²⁶. Taking into account the possibility that the jury might find there was no conspiracy, it requested

²⁶ The requested instruction provided:

"In the assessment of damages against the various defendants, you should consider the date as of which the defendant or defendants commenced the activities herein complained of, bearing in mind plaintiff's claim that its damages were sustained during a period commencing September 26, 1949. Accordingly, if you find from a preponderance of the evidence that each of the defendants, as a result of a conspiracy, engaged in the activities herein complained of and that plaintiff's losses, if any, commenced as of September 28, 1949, then each of the defendants would be liable for all of the damages, if any, sustained on and after that date regardless of whether he or they participated in the unlawful activities subsequent to that date. On the other hand, if you find from a preponderance of the evidence that there was no conspiracy, then the defendants may only be held liable for such damages, if any, that plaintiff sustained as a result of the activities of such defendant or defendants, bearing in mind the instruction which I have given you as to responsibility for the damages resulting from the riot, if any.

I further instruct you that the plaintiff Hawaiian Pineapple Company can make only one recovery of the damages, if any, awarded to it in this action, and that if you should find for the plaintiff against some of the defendants in one sum and against others of the defendants for another sum, the plaintiff would be only entitled to recover the larger sum awarded, and is not entitled to recover the total of the different sums awarded." (Tr. 133-134)

that the jury be instructed that the "defendants may only be held liable for such damages, if any, that plaintiff sustained as a result of the activities of such defendant or defendants, bearing in mind the instruction which I have given you as to responsibility for damages resulting from the riot, if any". This proposed instruction also requested the jury to take into consideration in the assessment of damages the date as of which the defendant or defendants commenced the activities complained of by Hapco. Since different sets of damages might be awarded against the unions and the individuals in the event no conspiracy were found, the proposed instruction provided that, if this occurred, Hapco could only make one recovery of the larger sum awarded.

After hearing the Court's instructions with respect to the liability of the individual appellees, Hapco excepted to the instructions that the individuals could not be liable unless the unions were also found liable and to the failure of the Court to instruct that Hapco could recover against the individuals and/or the unions on a common law theory because of the physical activities they engaged in which prevented Hapco from carrying on its business (Tr. 1450).

E. Prejudicial Error in Failing to Submit Separately the Issue of Appellees' Common Law Liability.

The trial court has a mandatory duty of submitting to the jury every material issue of fact raised by the pleadings and supported by substantial evidence. 53 Am. Jur., Trial, Sec. 172, p. 149; *Best v. District of Columbia*, 291 U.S. 411, 415 (1934). Failure to submit such an issue for the jury's consideration is error. *Marande v. Texas & Pacific Railway Co.*, 184 U.S. 173 (1902); *Callen v. Pennsylvania Railroad Co.*, 332 U.S. 625 (1948). In effect such a failure to submit an issue constitutes the direction of a verdict against the aggrieved party on that issue, but a verdict may only be directed if there is a mere scintilla of evidence or none at all (see *Barron & Holzhoff*, *Federal Practice & Procedure*, (Rules Ed.) Vol. 2, Sec. 1075). This is hardly the state of the evidence with respect to the individual appellees.

The Pre-Trial Order posed the issue of the liability, if any, of the individual appellees for alleged unlawful acts resulting in damage to Hapco's business and property, regardless of whether or not these alleged unlawful acts were performed pursuant to an alleged conspiracy. Hapco submitted substantial evidence concerning the activities of the various appellees and the damages they had caused it. Under this state of the record, Hapco was entitled to have submitted to the jury the issue of whether the appellees,

or any of them, were guilty of tortious acts resulting in damage to the plaintiff, regardless of whether or not the allegations of conspiracy were sustained. It is fundamental that, even though Hapco failed in its proof of a conspiracy, it was entitled to recover damages against such of the appellees as were shown to be guilty of tortious conduct resulting in damages to it.

The prejudice that resulted to Hapco from the failure of the District Court to submit the issue of the liability of the appellees, regardless of any alleged conspiracy, is clear. Hapco was deprived of the opportunity of having the jury pass upon the simplest and best case Hapco had against the individual appellees, namely, whether the appellees, or any of them, engaged in unlawful acts against Hapco which resulted in damage to it.

II.

PREJUDICIAL ERROR TO HAPCO RESULTED FROM THE DISTRICT COURT'S INSTRUCTIONS TO THE JURY AS TO THE LIABILITY OF THE INDIVIDUAL APPELLEES.

After instructing the jury at length on the liability of International and Local 8 to Hapco under the provisions of the Act (Tr. 1418-1435), the District Court then turned

to consider the liability of the individual appellees and instructed in substance:

(1) That if neither International nor Local 8 were found liable (under the instructions previously given dealing with their liability under the Act), a verdict should be immediately returned in favor of the individual appellees (Tr. 1435, 1440);

(2) That only if one or both of the unions were found liable under the Act, could the jury consider the liability of the individual appellees (Tr. 1435, 1440);

(3) That an individual appellee could only be found liable if he was a member of a conspiracy between either or both of the unions and the individual appellees (Tr. 1436-1437, 1438, 1440);

(4) That the conspiracy of which the individual appellees had to be a member was one to restrain commerce between Hawaii and any state, and to encourage or induce the employees of any employer by concerted action in the course of their employment to refuse to transport, handle or work upon the cargo of pineapple at The Dalles, Oregon, or to perform any services in connection therewith, with the object of forcing any employer or other person to cease doing business with any other person, and with the purpose of doing injury

to the business or property of Hapco (Tr. 1436-1437, 1439-1440).

**A. Error in Instructing
that Verdict Against Individual
Appellees Dependent upon Verdict
Against One or Both of the Unions
Under the Act.**

The liability of the individual appellees was not dependent upon the liability of the two labor organizations. Neither the issues framed in the Pre-Trial Order nor any requirements of law demanded such dependency.

In its contentions in the Pre-Trial Order, Hapco filed one general claim for relief based upon the total set of occurrences between it, the unions, and the individual appellees. Hapco predicated its claim for relief on the theory that the damages it sustained resulted from a violation of Sec. 303 (a) (1) of the Act by the two unions and from various unlawful acts under the common law by the unions and the individual appellees, it being alleged in both instances that the activities involved were performed pursuant to a conspiracy.

The liability of International and Local 8 depends upon whether their activities constituted a violation of Sec. 303

(a) (1) of the Act²⁷. The liability of the individual appellees, as submitted by Hapco at the conclusion of the trial, depends upon whether any of them had participated in the riotous acts of September 28 against Hapco resulting in damage to it. Hapco's right of action for such unlawful acts was in no way dependent for its existence upon whether or not Hapco was able to establish liability against either or both of the unions by satisfying the statutory requirements of Sec. 303 (a) (1) of the Act.

Nor were there any contentions in the Pre-Trial Order or issues framed therein which in any way required Hapco to make a recovery against either or both of the unions under the Act before it could make a recovery against the individual appellees. On the contrary, under the issues posed in the present action and under the law applicable thereto, the jury could have brought in a verdict against one or more of the appellees even though they did not bring in a verdict against either or both of the unions.

The error of the Court in instructing that the jury could only consider the liability of the individual appellees if one or both of the unions was found liable under the Act,

²⁷ The various statutory elements necessary for a violation of Sec. 303 (a) (1) of the Act will be discussed in detail in connection with the appeal of International and Local 8 from the judgment entered against them.

was pointed out by Hapco when it took exception thereto, on the ground that the action against the individuals was "to just physically stop a business operation in connection with the riot and other activities that they engaged in" and that the jury could bring in a verdict against the individuals even though they did not bring one in against the unions (Tr. 1450).

**B. Error in Instructing
that Liability of Appellees
Dependent upon being Co-
conspirators with Either or
Both Unions.**

Not only did the District Court require the jury to find liability against either or both of the unions under the Act before even considering the liability of the individual appellees, but it also required that their liability be dependent upon their having further entered into a conspiracy with either or both of the unions to restrain trade between Hawaii and any state and to, in effect, violate the provisions of Sec. 303 (a) (1) of the Act.

In so instructing, we submit that the Court erred in two respects: (1) in requiring that a conspiracy be found; and (2) in stating the elements of the conspiracy.

As previously pointed out, it is not essential that a plaintiff who pleads that certain unlawful acts were committed

pursuant to a conspiracy actually prove the conspiracy. Such a charge is not the gravamen of any complaint and was certainly not the material part of Hapco's common law action against the individual appellees and the unions. The authorities are clear that, even though no conspiracy is proven, Hapco may recover damages against such of the appellees as are shown to have committed unlawful acts directly resulting in damage to it.

Secondly, in respect to the nature and elements of the conspiracy which the Court required the jury to find between the unions and the individual appellees before a verdict could be rendered against any of the latter, the District Court itself recognized in its opinion denying the motions for new trials that it "placed a somewhat greater burden upon Pineapple as to these individuals." (Tr. 164-165). The District Court also recognized that it "may not have accurately stated the elements of liability at common law as to the individuals" but disposed of any shortcomings in this respect by stating that no exceptions were taken by Hapco to the instructions upon this ground (Tr. 165).

In stating the elements necessary to be found by the jury in order for it to find liability against the individual appellees, the District Court almost completely followed the requirements of Sec. 303 (a) (1) of the Act. The action of the District Court in this respect is puzzling, for Sec. 303 (a) (1) of the Act relates to prohibited conduct by labor

organizations and the District Court itself held that an action could not be maintained against the individual appellees under the Act (Tr. 164).

Although Hapco cast its conspiracy charge generally in terms of the language of Sec. 303 (a) (1) of the Act (Tr. 57-58), its broad allegations in this respect were thereafter circumscribed and limited by a specification of the various unlawful acts allegedly committed by all of the parties defendant. Moreover, in light of the proof adduced at the trial as to the acts which directly caused all of Hapco's claimed damage, Hapco was not restricted to relying on the tort of interfering with and obstructing the transportation of goods between a territory and the states or from one state to another²⁵. Instead, insofar as its common law ground was concerned, Hapco desired to submit it to the jury, in part, on the basis of the activities of the individual appellees in rioting upon the dock of the Port on September 28 and the consequent damage to Hapco resulting there-

²⁵ Thus, the District Court stated in its opinion:

"Interference with transportation of goods between a territory and states or from one state to another is a direct burden upon and obstruction of interstate commerce. If such an obstruction occurs, it is illegal", citing, *Waterfront Employees of Portland, et al, v. CIO*, 1 CCH Lab. Cas. 386; *M & M Wood Working Co. v. Plywood & Veneer Workers Local, etc.*, 1 CCH Lab. Cas. 389. (Tr. 186)

from (Tr. 130-131). The propriety of submitting it on this basis and the elements of liability involved have already been considered.

When the Court failed and refused to give instructions to this effect or in any way to follow the theory upon which they were based, but instead gave its instructions predicated the common law liability of the individuals upon the standards in Sec. 303 of the Act, Hapco took specific exception to the failure of the District Court to instruct that Hapco could, in effect, only recover against the individuals and/or the unions under the Act. Hapco contended that it was entitled to recover, even if no Taft-Hartley action was involved by reason of the physical activity which had been engaged in to prevent Hapco from carrying on its business (Tr. 1450-1451).

C. Prejudice to Hapco from Erroneous Instructions.

Best evidence of the prejudice that resulted to Hapco from the District Court's erroneous instructions is in the verdict of the jury against International and Local 8 but in favor of the individual appellees.

The District Court itself admitted that it had placed a "somewhat greater burden upon Pineapple [Hapco] with respect to establishing the liability of individuals" (Tr.

164-165). Can there be any doubt of this "greater burden" and of the prejudice which resulted to Hapco when the District Court required it to establish by a preponderance of evidence three principal conditions before the jury could find any individual appellee liable: (1) a violation of Sec. 303 (a) (1) of the Act by the unions, or either of them; (2) a conspiracy between the unions, or either of them, and the individual appellees; and (3) the restraining of trade between Hawaii and any state and the engaging in the prohibited activities under Sec. 303 (a) (1) of the Act.

We submit that each and every one of these three conditions precedent to the liability of an individual appellee was unwarranted. Each one materially burdened the task of Hapco in establishing the liability of any of the appellees. To prove, for example, that certain unlawful acts resulted in damage is one matter; to prove that the same acts were committed pursuant to a conspiracy, as required in the District Court's instructions, is far more difficult. All three of the conditions precedent to individual liability enunciated by the District Court taken together evidently proved to be too difficult a burden for Hapco to meet.

III.

HAPCO IS ENTITLED TO A PARTIAL NEW TRIAL ON THE SEPARABLE ISSUE OF THE COMMON LAW LIABILITY OF THE INDIVIDUAL APPELLEES WHICH WAS NOT SUBMITTED TO THE JURY.

Upon the trial of this action, the jury returned a verdict in favor of Hapco and against the two unions, but it found in favor of the individual appellees. However, the District Court failed to submit to the jury the issue of the liability of the individual appellees for their riotous activities on September 28. Instead, the Court only submitted to the jury the issue of whether the individual appellees were co-conspirators with the unions in their violations of the Act. On this appeal, Hapco seeks a partial new trial of the liability of the appellees for their tortious conduct leading up to, and culminating in, the riot staged against Hapco upon the dock of the Port of The Dalles on September 28.

A. Power of the Court to
Remand for a Partial New Trial.

The power of this Court to order a new trial as to separable parties or separable issues, or both, where prejudice to the parties does not result, is unquestioned by modern authority. *Atkinson v. Dixie Greyhound*, 143 F. (2d) 477 (CA 5, 1944), cert. denied, 323 U.S. 758; *Thomp-*

son v. Camp, 167 F. (2d) 733 (CA 6, 1948) cert. denied, 335 U. S. 824; see Commentary, 3 Fed. Rules Service, p. 729, Sec. 59a. 22.

The purpose of this rule is to prevent unnecessary re litigation of issues and of the liability of parties and to limit new trials to those issues which were incorrectly decided, or not decided at all. *Yates v. Dann*, 11 F.R.D. 386 (D.C. Del., 1951); see, Annotation, 143 A.L.R. 7, at 14-15.

**B. The Issues and Parties
herein Involved are Separable
for the Purpose of a New Trial**

There can be no doubt that an action could have been maintained by Hapco against only the appellees for their tortious acts under the common law. The fact that the unions and the individual appellees were sued in one action and linked together by allegations of a conspiracy does not intertwine them with respect to their respective legal liability. A new trial as to the individual appellees would result in exactly the same situation which would have existed had suit originally been brought against them alone.

Moreover, the issue of appellees' liability for their tortious conduct is distinct and separable from more complex questions of their liability as co-conspirators with the unions in tortious conduct for which the latter might be liable. Not only is it simpler, but it requires less proof as

well as different proof than the conspiracy case against the unions and the individuals. Under it the jury need only have presented to it the question of whether the appellees went upon the dock and injured Hapco's property.

In the District Court's own words, a "greater burden" was placed upon Hapco with respect to proving the liability of the individuals (Tr. 164-165). In so doing, even the District Court recognized a distinction between the issue of the unions' liability under Sec. 303 (a) (1) of the Act and the issue of the individuals' liability as conspirators with the unions. Still more distinct is the issue of the liability of the appellees for their common law tortious acts which Hapco sought unsuccessfully to have submitted to and determined by the jury.

Accordingly, we submit that the individual appellees are separable from the unions in this case for the purpose of a partial new trial and that their common law liability is a separable issue from that involving an alleged violation of the Act and any conspiracy related thereto.

A new trial on the separable issue of the liability of the appellees cannot be deemed prejudicial to them because this issue was not submitted to the jury for decision. Having thus never had their common law liability separately presented, the appellees are in no position to complain that a new trial limited as to them and their liability is prejudicial to them. The appellees were always subject to an action

directed against them alone. A partial new trial without the presence of the two unions as defendants would, in fact, appear to favor rather than prejudice the appellees for they would not be confronted with evidence bearing upon the violation of the Act by the unions.

CONCLUSION

Under the jury's verdict in this case, not one of the appellees was found to be liable, despite clear and un-rebutted evidence that at least sixty of them unlawfully went upon the dock of the Port of The Dalles and there rioted against Hapco, injuring its employees and damaging its property and business. The jury's verdict in this respect is a true miscarriage of justice, under which violence has been sanctioned and individuals have been allowed to escape liability for their unlawful acts.

We submit that the verdict resulted from the failure of the District Court to allow the jury to separately pass upon the liability of the individual appellees for their riotous activities and was further due to errors committed by the District Court in the actual instructions it gave to the jury with respect to the liability of the appellees.

Accordingly, we respectfully submit that Hapco should be granted a partial new trial against the appellees on the

limited issue of their liability under the common law for the damages which their tortious acts inflicted on Hapco.

Respectfully submitted,

KRAUSE & EVANS

GUNTHER F. KRAUSE

DENNIS LINDSAY

GERALD H. ROBINSON

Attorneys for Appellant

Hawaiian Pineapple Company, Ltd.



United States
COURT OF APPEALS
for the Ninth Circuit

INTERNATIONAL LONGSHOREMEN'S &
WAREHOUSEMEN'S UNION (CIO) and
INTERNATIONAL LONGSHOREMEN'S &
WAREHOUSEMEN'S UNION, LOCAL 8,
Appellants,
vs.

HAWAIIAN PINEAPPLE COMPANY, LTD.,
a corporation,
Appellee.

HAWAIIAN PINEAPPLE COMPANY, LTD.,
a corporation,
Appellant,
vs.

MARTIN E. ADEN, et al.,
Appellees.

Appeal from a Judgment of the United States District
Court for the District of Oregon.

JAMES ALGER FEE, Judge.

PETERSON & POZZI
901 Loyalty Building
Portland 4, Oregon

Attorneys for Appellees
Martin E. Aden, et al.

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JAMES ALGER FEE, Judge.

SUPPLEMENTARY STATEMENT OF THE CASE

Appellant's Statement of the Case, although presented at great length, does not include a fair statement of the theory upon which the appellant presented its case to the Court below nor does it fairly state the theory of the case

there presented by appellees. Since the appellees and the unions joined in the defense of the case in the Court below, appellees herein adopt the Statement of the Case in the Opening Brief filed on behalf of the appellant unions at pages 6 to 9. Because the main contention made by the individual appellees is that the Court below presented the case against them, as requested by and without the objection of, appellant, a complete statement of the case and the questions involved will be made in connection with the argument presented by appellees.

SUMMARY OF ARGUMENT

The gist of appellant's contentions in its brief is that the Court, by its instructions, failed to permit the jury to find that an individual was liable for the damage which he, himself, may have committed, even though the jury found that there was no conspiracy or concerted action, as defined by the Court. (Appt. Br. 48) Appellees are in agreement that this was the effect of the instructions of the Court. Appellees submit, however, that insofar as the appellant's brief attempts to convey the impression that appellant presented its case on any theory under which it sought the assessment of damages against an individual for his own wrongful act, it is grossly misleading. On the contrary, it was the appellees who argued that provision should have been made for the assessment of damages as against each individual for his own wrongful acts in the event that the jury found that there was no concerted action. The Court, at the urging of and with no protest from appellant, submitted the case against the individuals

on the basis all of the individual participants were liable for the full amount of damages, if any.

If there was any error, therefore, in the instructions of the court, it was error invited by the appellant by the manner in which their case was presented in the complaint and pre-trial order, in the statements of its counsel to the court at various times during the trial, and its failure to object to the rulings of the court which indicated clearly the court's position incorporated in its instructions.

The objections taken by the appellant to the instructions of the court and to the failure of the court to give instructions, which it requested, are not pertinent to the error which it now, for the first time, claims that the court committed, and were not sufficient to advise the trial court of the contentions which it now makes. The jury was instructed in a manner consistent with appellant's claims and would have been entitled to bring in a verdict against appellees, had it adopted appellant's contentions.

If any element of prejudice existed in the case, it was brought about solely by appellant's attempt to present its case in a manner which would be most conducive to the appearance of prejudice by joining the assault and battery cases and by failing to give the jury an opportunity to find an individual liable for the damages which he, himself, might have caused, by virtue of which appellant believed that the amount of its total recovery would be enhanced.

Appellant's complaint, amended complaint, and contentions made in its pre-trial order did not state a claim

for relief against the individual appellees because of appellant's reliance upon the standards of the Labor Management Relations Act of 1947, which have been held to create no liability on the part of other than labor organizations, either under the Act, or at common law.

If appellant were entitled to a new trial, it has, by its own choice, so intermingled its claims against the unions and against appellees that it would be extremely prejudicial to appellees for a partial new trial to be granted as to them alone.

ARGUMENT

I

Appellant's theory of the case was adopted by the court and it cannot now complain because the results were not as anticipated.

A good deal of confusion apparent in a comparison between appellant's brief and the position it took during the trial derives from the ambiguity of the term "individuals". It will be demonstrated that throughout the course of the proceedings the appellant used the term "the individuals" as a collective noun, referring to a group, which it alleged had participated in concerted action, and that all of the members were liable for all of the damages sustained by Pineapple, and this construction was adopted by the Court.

The other construction of the term "individuals", which was urged by appellees, is as a term of reference to a number of discrete entities, each of whom might be held responsible for damage caused by his own acts in the event

the jury failed to find the existence of concerted action sufficient to make each responsible for the acts of others.

Appellant now attempts to take the position that the latter construction was one which it had in mind during the trial and which was rejected by the court. Thus it has, as will be shown, attempted to pick portions out of context of the record as a whole to bolster its claim in this regard and completely ignored the statements made by its counsel during the course of the proceedings which made it quite clear that the position which it then urged was adopted by the court. It is only by reference to the record and a point by point analysis of the manner in which the case was presented by the appellant that the Court's opinion denying appellant's motion for partial new trial can be fully appreciated.

An examination of the pleadings and pre-trial order leaves no doubt that appellant's tactics were directed towards a verdict in its favor insofar as the individuals are concerned, by virtue of alleged conspiratorial violations of the strictures of Section 303 of the Labor Management Relations Act, 29 U.S.C.A., Sec. 187 (Appt. Br. 3).

The complaint originally filed in the case states in paragraph I that the action arises under that Act and, since there was no allegation of diversity of citizenship, it must be assumed that appellant's theory at that time was that the individuals were responsible under the Act itself. (Tr. 3) This complaint was filed in December, 1949, and in July, 1951, an amended complaint was filed in which the allegation of jurisdiction based upon diversity of citizenship and amount was contained. The first count

of the amended complaint seeks a recovery against all defendants without any allegation as to a violation of the Act (Tr. 30 to 44). The second count alleges that the action arises under the Act and realleges each and every allegation in the first count, except that of diversity of citizenship and jurisdictional amount. The third count is based upon the Act and alleges damages created by virtue of a jurisdictional dispute.

The individuals are named defendants under each of the three counts and the only difference between the first and second counts is that there is an allegation of diversity of citizenship and jurisdictional amount in the first count, which is replaced in the second count by an allegation that the action is based upon violations of the Act. The allegations of fact which are used by appellant upon which to base liability under the Act are exactly the same as those upon which it seeks to base liability by virtue of the existence of diversity of citizenship. It is clear that the allegations of this portion of the complaint, if true, constitute a violation of Section 303 (a) (1) of the Act.

It is further clear then, from the pleadings, that the amended complaint was based upon a theory that the individuals might be held liable for conspiratorial violations of the Act at common law, provided that the Court had jurisdiction by virtue of diversity of citizenship and jurisdictional amount.

An examination of the pre-trial order discloses that the nature of the proceedings are stated to be as follows:

“This is an action by the plaintiff to recover damages for injuries to its business and property which

it claims to have sustained by reason of the activities of the defendants in boycotting and preventing the delivery of a cargo of pineapple which the plaintiff was shipping from Honolulu, Territory of Hawaii, to processors of fresh fruits in California." (Tr. 54)

No distinction is here made between the activities of the various defendants or their responsibility in connection therewith. Again, in the main contention as to the activities causing the damage, no distinction is made as to the activities or responsibility as between the respective defendants (Tr. 57 to 60). It may be seen from these contentions that the activities of the respective defendants are indistinguishable as are their objectives and purposes.

There is no contention made in the pre-trial order that any given individual is liable for any given amount of damages, nor is there any contention that any portion of the damages might be assigned to any named individual defendant to the exclusion of others or in a different amount than that of any other. The issues made up by the parties simply do not provide for the assessment of any damages on any basis other than the responsibility of one participant for the acts of all.

The question of whether or not there was a conspiracy to injure the plaintiff was raised by contention 18 (Tr. 68), but all of the questions, with respect to the amount of damages, are based upon the finding of the conspiracy as alleged by the plaintiff and not upon any non-existent contention that the individuals could be subject to liability other than by virtue of a conspiracy.

An example of what has been heretofore denominated as the collective usage of the term "individuals" is demonstrated by issue No. 8 (Tr. 67) taken in context:

"(6) Did the International engage in the acts and conduct alleged by plaintiff?

(7) Did Local 8 engage in the acts and conduct alleged by plaintiff?

(8) Did the individual defendants engage in the acts and conduct alleged by plaintiff?

(9) If so, did the alleged acts and conduct cause the consequences claimed by plaintiff?

(10) If so, were such acts and conduct the proximate cause of damages alleged to have been sustained by plaintiff?

(11) If so, what was the amount of the damages that plaintiff allegedly sustained?" (Tr. 66, 67)

If these issues were meant, as claimed by appellant in its brief, to provide for damages other than by way of an award of one sum, as against all participants, it would have been easy enough for appellant to so provide by making an issue thereof.

Another clear example of appellant's intention to lump all of the defendants and damages together is contained in the following issues:

"(22) (a) Did the defendants engage in a combination and conspiracy to boycott plaintiff's cargo and to injure its business, etc. and engage in various acts and conducts in furtherance thereof as alleged by plaintiff?

(b) Did the defendants engage in a combination and conspiracy to violate Section 303 (a) (1) of the Labor Management Relations Act in the manner complained of by the plaintiff?

(c) Did the defendants engage in a combination and conspiracy to violate Section 303 (a) (4) of the Labor Management Relations Act in the man-

ner complained of by the plaintiff?

(23) If so, did the alleged combination and conspiracy and the acts and conduct in furtherance thereof cause injuries to plaintiff's business and property?" (Tr. 63, 69)

That appellant's position at the trial was different from that which it takes in its brief is most clearly shown by the various statements made by its counsel in discussions with the court.

It was appellant's position that the assault and battery cases were on a different footing from the instant case and speaking with reference to those cases Mr. Krause said:

"The mere fact that they were in The Dalles is not going to be enough except with respect to those that were on the dock, possibly. It could be inferred from the fact that they were on the dock that they were lending aid or assistance to those that were engaged in damaging our equipment. *But as to the damage to our business, the entire matter arises out of the conspiracy among the individuals and among the unions to picket our operation.*" (emphasis ours) (Tr. 924)

This position was reiterated at a later time and the court, in apparent agreement with Mr. Krause, stated:

"The assault cases depend on entirely different principles than the other.

* * * * *

"Mr. Andersen: I thought that counsel was referring to the men in the assault cases that he intended to hold because they were in The Dalles. I misunderstood him on that point, your Honor.

The Court: My point is that if they find this congregation of men on the dock was gathered for

an unlawful purpose and that they invaded the dock that way, everybody could be held. That is my theory of it. Certainly anybody that aided or abetted or counseled them there could be held." (Tr. 1405)

The best illustration of this point occurred at the time of the submission of the forms of verdict by the appellant. Appellant submitted three forms of verdict for plaintiff to the court. One was to be used in the event the jury found in favor of the plaintiff and against all of the defendants and provided one blank space for the assessment of damages.

A second contained the names of all of the defendants and provided for the assessment of one sum as damages. This was the verdict actually given by the court (Tr. 1467-8).

Appellant presented a third form which provided for the assessment of one sum as against the unions and another sum as against all the individuals who would be held. At this point the court inquired:

"The Court: On what theory do you think that they could return a different type of verdict against the unions?

Mr. Krause: Pardon me. I didn't hear.

The Court: I say, on what theory do you think they could return a different type of verdict against the unions than the individuals?

Mr. Krause: If they were to return a verdict against the individuals only for the damage attributable to the invasion of the dock and hold the unions for a larger period of time; that is, several days prior to that. I didn't know exactly how your Honor was going to instruct them on that, but it seemed to me conceivable that they might consider the damages

against the individuals on Wednesday, if the jury felt they were not in the conspiracy or in the picture earlier; and that the unions, of course, had begun this operation, if they did at all, on the 26th or earlier, and the company's damages were accruing daily. There is in the evidence the facts necessary to determine what the accruing damage was per day.

Personally, we would prefer to have it submitted to the jury on just one theory, but it seemed to us that there was a possibility that the jury might want to do that, and I think they could on the evidence. However, in our view of the case this was a conspiracy and every part was a part of that conspiracy. Under the law as we understand it a conspirator coming into the picture a few days later than another is not relieved of the damages that have accrued at the time he entered the conspiracy.” (emphasis ours) (Tr. 1408, 1408A, 1408B)

The question might well be asked as to how the forms of verdict providing for only one assessment of damages as against all of the individuals squares with the claim that:

“It is fundamental that, even though Hapco failed in its proof of conspiracy, it was entitled to recover damages against such of the appellees as were shown to be guilty of tortious conduct resulting in damages to it.” (Appt. Br. 48)

If this had been appellant's contention at the trial, it would have submitted a verdict form with a blank space for damages next to each of the names of the individual defendants. The court did just what appellant's counsel said he preferred.

To make this change of position by appellant even more ludicrous it is pertinent to note the request made

by counsel for appellees for the submission of a form of verdict which would,

“... have given the jury an opportunity to assess damages against the various defendants in such an amount as the jury may properly find, if they think the evidence shows that certain individuals may have been more culpable than other of the individual defendants . . .” (Tr. 1410)

See also (Tr. 1463, 1464, 1484)

The court rejected this form because it allowed for allocation of damages and reiterated its intention to instruct on an all or nothing at all basis, and that if there were no conspiracy found that nobody would be liable, again without objection from appellant. (Tr. 1411-13)

II

The objections made by appellants to the instructions are insufficient for its present claim of error.

After the jury had been instructed, the appellant took the following exceptions:

“Then the Plaintiff Hawaiian Pineapple Company will take an exception to the instruction that there can be no verdict against the individuals in that case unless the unions are also found liable, because there is a cause of action stated against them that was broader than a conspiracy to restrain trade, and that is to just physically stop a business operation in connection with the riot and other activities that they engaged in. That was one of the counts under the original complaint, and it seems to me that they could bring in a verdict in the Hawaiian Pineapple Company case even though they did not bring one against the unions.

Then my second point is the failure to instruct in the Hawaiian Pineapple Company case that the

plaintiff could recover against the individuals and/or unions on a theory other than the Taft-Hartley Act, because there was a diversity of citizenship and they engaged in physical activities that prevented us from carrying on our business which they were in no event, under any theory of labor dispute or anything else, entitled to engage in. We would be entitled to recover on (1741) that theory if there were no Taft-Hartley action involved here.

Those are the only things that we feel the Court has not covered." (Tr. 1450, 1451)

The instruction that there is no liability of the individuals unless the unions were liable, if erroneous, was made harmless to appellant by the verdict against the unions. It might be pointed out however, that the instructions on liability of the unions and individuals followed the pleadings and contentions made by appellant quite closely in a number of respects and that the allegations made by appellant invited the court to treat the question in the way in which it did. Compare the instructions given by the court (Tr. 1435-6) with the contentions in the pre-trial order. (Tr. 57)

The only object and purpose ascribed to the activities of the individuals by appellant was that of "boycotting its business" (Tr. 187). The jury was instructed without objection by appellant, that if the sole object of the activities was to protect wages and working conditions then appellees would not be liable, *without objection by appellant.* (Tr. 1429) It is only on appeal that the position is taken that individuals could be held liable for damages even though their objects were other than those which appellant ascribed to them.

The second point made by appellant in its exception to the instructions is equally faulty. From the beginning of its instructions the court stated all of the contentions which were made by plaintiff in its pleadings and in its contentions in summary form (Tr. 1421, 1422). It included in these contentions the allegations as to the riot and the subsequent damage alleged to have been caused thereby. At the time of giving more specific instructions with respect to the liability of the individual, the court again sets forth the contentions made by plaintiff, and in a sweeping statement, it instructs the jury that a conspiracy may be found "if the evidence shows a concert of action between two or more persons to accomplish an unlawful purpose" (Tr. 1438).

The effect then of the court's instructions was to tell the jury that if they found the individual defendants engaged in concerted action to commit the unlawful acts alleged by the plaintiff and for the purposes to which plaintiff had alleged they had been committed, then they could hold the individual defendants liable. The complaint made by the appellant that the unions and the individuals should have been instructed on a theory other than the Taft-Hartley Act is of no merit, since the court did not use the Taft-Hartley Act for the purposes of its instructions, but merely the contentions of appellant. Appellant does not refer in taking its exceptions to any specific instructions which it requested the court to give. The appellant's exceptions are certainly not upon the grounds that the jury was not permitted to find damages as to any individual other than by virtue of a conspiracy which is the main claim in its brief.

The first requested instruction which appellant claims the court did not give and which is set forth in appellant's brief at page 32, is substantially the instruction given by the court (Tr. 1436, 1437), with the exception that the court used the word "conspiracy" rather than the term "riotous and tumultuous manner". But in view of the court's broad definition of a conspiracy as including any concerted action to effect the common purpose it cannot be maintained that the court's failure to raise a portion of its charge in the emotionally loaded words used by appellant, which mean the same thing, is erroneous.

The second requested instruction which appellant claims the court erred in failing to give (Tr. 32, 33), is inconsistent with the first instruction in that it leaves out the statement of the objects and purposes of the individuals, which the court believed to be important in view of the issues presented by appellant. Appellant cannot complain because the court chooses to give only one of two inconsistent instructions requested by it.

The third requested instruction (Tr. 33, 34) is the one which appellant relies on most heavily to support its claim in the brief that it had intended to allow the jury to pass directly upon the liability of each of the individual appellees, regardless of whether they were also engaged in a conspiracy (Tr. 44, 45). This instruction proceeds upon the theory that even if there were no conspiracy, the jury would be entitled to hold an individual participant responsible for all of the damages caused by other individuals. That is made evident by the second paragraph of the requested instructions where it appears that all of the

defendants would be liable for the largest sum as against any one defendant. If appellant's contention were correct that this instruction gives the opportunity for assessment of damages for each individual, then the damages would have been a total of the separate damages caused by each. Here again, appellant was attempting to avoid giving the jury the opportunity to make individual assessments for reasons best known to it.

The position of the court, in its opinion, that no exceptions were taken upon the ground of any mis-statement of the common law liability of the individuals may now be understood. Obviously, the court felt, as the record proves, that it had submitted the case generally on the grounds put forth by the appellant by virtue of which the jury was required to assess damages in a lump sum and the court did not feel that any exceptions had been taken or alternative proposed by the appellant whereby damages could have been assessed on an individual basis and, for this reason, believed that the objections and exceptions of appellant were insufficient (Tr. 165). Even if the court had felt that the issues had raised the question of recovery on an individual basis in the event of a finding of no conspiracy, it would certainly be surprised to find the appellant taking this position on appeal in view of the lengthy arguments made in its support by appellees at the trial, which it rejected. The law is clearly stated by Rule 51 of the Federal Rules of Civil Procedure which states:

“No party may assign as error the giving or the failure to give an instruction unless he objects thereto before the jury retires to consider its verdict, *stating*

distinctly the matter to which he objects and the grounds of his objection." (emphasis ours)

This rule has been taken in connection with Rule 46 of the Federal Rules of Civil Procedure which states:

"Formal exceptions to rulings or orders of the court are unnecessary; but for all purposes which an exception has heretofore been necessary it is sufficient that a party, at a time that the ruling or order of the court is made or sought, makes known to the court the action which he desires the court to take or his objections to the action of the court and his grounds therefore; . . ."

There have been a number of cases decided by this Court which have stated in effect that these rules mean what they say and that Appellants are required to have laid a foundation in the court below for the assignments of error presented in this Court. See:

Bercut v. Park Benziger & Co., 150 F. 2d 731;

Christensen v. Troller, 171 F. 2d 66

Shevelin Hixon Co. v. Smith, 165 F. 2nd 170

III

Appellant made the conspiracy the gravamen of this action and may not now complain because the case was submitted on that basis.

There is no quarrel with the law that normally a charge of conspiracy is not the gravamen of a complaint. In the usual cause, even if a conspiracy is not proved, the plaintiff may still recover from such defendants as engaged in tortious conduct, causing damage to it, but this is not true of a case in which the parties by choice or by request make a finding in their favor dependent upon a

finding of conspiracy. Nor is it true in a case where the only recovery sought is for activities which would have been impossible but for concerted action on the part of the defendants. An annotation in 152 A.L.R. 1148 sets forth a number of cases where the action is such that the harmful effect results only through collective action and states:

“An outstanding example of this class of case is illustrated by the collective power or pressure which results from group action, and which would be impossible or absent in the case of mere individual effect.” 152 A.L.R. 1154

In *Landau v. Hostetter*, 266 Pa. 7, 109 A. 478 (1920) plaintiffs alleged a conspiracy by three defendants to evict them from leased premises. The court instructed the jury that unless they found a conspiracy there could be no recovery and defendant claimed error. In a brief decision the court stated:

“The case was tried on the theory that the damage claimed by plaintiff resulted from the conspiracy.

“They made it the ground of their action, and the learned trial judge did not err in instructing the jury that they could not find a verdict against but one of the defendants . . .

“Here the conspiracy was the gravamen of the plaintiff’s complaint. In view of the pleadings and the theory upon which the case was tried, the assignments of error are without merit.”

The statements of counsel concurred in by the court which have been previously set forth show clearly that appellant regarded this case as being within the class mentioned by the annotator. The objects and results of the

activities of the appellees as alleged by appellant could not have arisen, according to appellant, but for the organization directed by the unions and appellant was seeking to recover for what it regarded as an organized boycott of its business. If appellant had been in court saying that X, Y and Z destroyed fifteen cases of pineapple by virtue of concerted action and requested the court to instruct that if they found that if there were no concerted action that X, Y and Z could still be held liable for the cases of pineapple which each of them may have destroyed, then the law cited by appellant would be applicable, but it cannot claim that the court was required on its own motion to submit the issue of damages caused by each individual merely because appellant was entitled to have such an issue submitted if it had so requested. The rule applicable here is stated as follows:

“Where it is sought to recover damages for several tortious acts, each giving rise to a separate cause of action, the plaintiff should allege the amount of damage claimed on account of each cause of action; a general allegation of the damages arising from all of such acts and a finding in accordance therewith are prejudicial to the defendant.” 15 Am. Jur., Damages, 751.

See also 53 Am. Jur. Trial 454, 488.

There is an unstated thread running through appellant's brief to the effect that the liability for a riot is something different from liability from a conspiracy to commit violent acts, as was charged by the court, which adds to the confusing picture painted in its brief. The authorities are in agreement that this distinction cannot be maintained by appellant. A case illustrating the point is the

one cited by the appellant (Appt. Br. 39), *Salem Manufacturing Company v. First American Fire Ins. Company of N. Y.*, 111 F. 2d 787, (1940). In that case this court examined the lengthy chain of decisions, all of which showed that to constitute a riot there must be in some way a premeditated concert of action for the purpose of accomplishing an objective agreed upon. The court quotes from Russell on Crimes as follows:

“ . . . But the violence and tumult must be in some way premeditated; for if a number of persons being met together at a fair, market, or any other lawful or innocent occasion happen on a sudden quarrel to fall together by the ears, it seems to be agreed that they are not guilty of a riot, but only of a sudden affray . . . But if there be any predetermined purpose of acting with violence and tumult, the conduct of the parties may be deemed riotous.” 111 F. 2d at p. 802.

“ ‘A tumultuous disturbance of the peace by three or more persons assembling together of their own authority, with an intent mutually to assist one another against any one who shall oppose them in the execution of some enterprise of a private nature, and afterward actually executing the same in a violent and turbulent manner, to the terror of the people, whether the act itself was lawful or unlawful’.” *Walter v. Northern Insurance Company*, 370 Ill. 283, 18 N.W. 2d, 906, 121 A.L.R. 244, p. 248.

It may thus be seen that every riot contains the element of concert of action.

In defining conspiracy as being a concerted action, the court necessarily included a riot. The instruction requested by appellant, had it been given by the court, might well have led the jury to believe that merely be-

cause a man was a part of a group of which some of the members were involved in unlawful activities, that he might be held liable for all damages committed by any members of the group, even though there was no concert of action between them.

The one case cited by appellant in which a number of people were held liable for damages caused by mob violence, *Calcutt v. Gerig*, 271 Fed. 220 (Appt. Br. 39), is a case in which the court held that a conspiracy had been, in fact, proved and the damages as against all of the defendants were based on the finding of the conspiracy. It seems most pertinent that the court in that case specifically charged the jury that the plaintiff was bound to prove a conspiracy before he was entitled to recover.

Appellant has cited portions of the transcript which do not support its claim that under the court's instructions the jury would not have been able to bring in a verdict against the individuals unless they were found to have conspired with the unions. (Appt. Br. 43)

The Court at one point stated that:

"If you find from the evidence that the individual defendants, *among themselves or together with* the defendants International and Local 8, or either of the unions conspired together . . ." (Tr. 1436) (emphasis added)

then the jury might find liability on the part of the individuals and the Court's instructions with respect to the individuals, read as a whole, would seem to indicate that if the jury found that the individuals had participated in

concerted action to do the proscribed acts, then liability might be found if one or more of the unions was also held to be liable, but that it was not necessary that the jury find that any individual had conspired with the unions, if the jury found that there was a conspiracy among the individuals, in order to predicate liability. However, at one point in instructing the jury, the Court stated:

“ . . . If on further consideration you find that the defendant union or unions against whom you have found liability further entered into a conspiracy, as above described, with the individual defendants, you will add to the verdict names of all the individual defendants against whom you find.” (Tr. 1440)

Whether or not the jury did rely on this instruction does not seem, however, in view of the allegations made by the appellant as to the responsibility of each for the conduct of all to be an important matter, and, it should be noted that while exception was taken by appellant to the instructions by the Court which made it necessary for the jury to find one of the unions liable in order to find the individuals liable, no exception was taken to any instruction by which the jury was required to find that the individuals were engaged in a conspiracy with the unions in order to be held liable.

The matter further, insofar as it is raised by the appellant, seems also to be immaterial in view of the allegations made as to the objectives and purposes of both the unions and the individuals in engaging in this conduct. Under appellant's theory there would be no other way to account for the actions of the individuals unless

they were found to have been engaged in concerted action with the unions, and appellant did not take exception to the instruction that if the defendants were acting solely for the protection of their own wages and working conditions that they would be granted a verdict. (Tr. 1407, 1429)

IV

Congress, in enacting the Labor Management Relations Act, limited liability for violations thereof to "labor organizations", and individual members of offending labor organizations are not liable.

It has already been pointed out that the acts charged against the individual appellees were identical to those upon which appellant based its claim against the unions under Section 303 (a) (1) of the Labor Management Relations Act of 1947. The additional charges made under Section 303 (a) (4) were not submitted to the jury and no objection was made by the appellant to their being withdrawn.

The trial court evidently viewed the claim against the individuals as being one which was based upon the common law applying the standards set by the Taft-Hartley Act and instructed the jury under the common law, which it felt applicable. The court did not feel that the state law applied to this case. In its opinion the court stated:

“It is true that the Court may not have accurately stated the elements of liability at *common law* as to the individuals. But no exceptions were taken to the instructions upon this ground. The subject is highly complicated and the question of wheth-

er the state law or a *common law adopted by the federal enactments* applies is extremely nebulous. Certainly, the ground chosen by Pineapple for objection and exception cannot be maintained. The jury found against Pineapple on a fair statement of the *common law*. This motion for new trial is therefore denied.' " (Tr. 165) (emphasis added)

In so stating, the court followed the theory propounded by the pleadings of appellant.

It is submitted by appellees that Congress, in considering the scope of damage actions arising out of labor disputes, specifically rejected an attempt to extend liability for violations of the Act beyond that of a labor organization so as to hold individual participants liable. The Act itself states:

"(a) It shall be unlawful . . . for any *labor organization* to engage in . . ." (setting forth proscribed activities) Section 303, Labor Management Relations Act. (Emphasis supplied)

The Labor Management Relations Act was passed as a compromise version between separate bills submitted by the House and Senate. The original Senate Bill is contained in Senate Report 105, 80th Congress, First Session and the original House bill is contained in House Report 245, 80th Congress, First Session. Section 12 of the House bill made unlawful certain concerted activities including all of those now contained in the present Section 303 and was much broader in scope. After listing the unlawful concerted activities, the House bill provided that any person injured in his business, person or property by such proscribed activities could sue the person or persons responsible therefor in any district court of the

United States having jurisdiction of the parties and could recover damages. H.R. 245, at page 61.

The chairman of the House committee in commenting upon this Section states that for the acts of

“violating collective bargaining contracts, violence in strikes, mass picketing, . . . for all these acts and others like them, unions and their members will be equally responsible with other persons under the law.” H.R. 245, at page 8.

The original bill which was reported out by the Senate Committee did not contain section 303, but this was an amendment proposed by certain members of the Committee, including Senator Taft, which was adopted on the floor of the Senate. Senate Report 105, 80th Congress, First Session. Upon going to conference between the House and the Senate Committee, Section 12 of the House bill, which would have made members of unions liable for unlawful concerted activities, was stricken, and Section 303, in its present form, was adopted by the conference committee and passed by both Houses in that form.

The report of the conference committee is contained in Report No. 510 of the House-Senate Conference Committee and the report clearly shows that the provisions of Section 12 as to the liability of individual union members was rejected and that the Act as reported out of the conference committee would subject only labor organizations to suit for damages for violations of the provisions of the Act. See Conference Report No. 510, 80th Congress First Session, at pages 42, 58, 67. It is thus seen clearly that Congress rejected intentionally an attempt

to impose liability upon individual union members for violations of the provisions of the Act.

At no point in the pleadings or the pre-trial order are the individual defendants alleged to have engaged in any activities which would not subject the defendant unions to liability nor are the individual defendants alleged to have engaged in any activities which the defendant does not claim are covered by the Taft-Hartley Act since it is admitted that it is only by virtue of the Taft-Hartley Act that unions could be made subject to suit in an action of this kind.

Appellee submits that this is not a case in which the appellant has sued the unions under one theory and the individual defendants under another theory. In each count of the amended complaint it is apparent that the defendant is relying upon the Labor Management Relations Act standards. The situation might be somewhat different if the allegations against the individuals were with respect to conduct which was not within the purview of the Act such as, for example, if it had been alleged as a separate allegation against the individuals that certain individuals did certain specific damage which constituted an unlawful trespass on appellant's property, but appellant has limited itself to a claim for damages against the individuals as a group by virtue of the standards contained in the Taft-Hartley Act, which gives it the right to sue the labor organizations against which it recovered judgment.

An attempt to find a case in which individuals have been joined with labor organizations involving a suit for

damages under the Act has been unsuccessful and this is indeed a novel case. However, the principles which have been set forth with respect to the construction and interpretation of the Act since its passage indicate perhaps why there is such a complete dearth of such actions. Perhaps the closest case in point is that of *Direct Transit Lines v. Local 406, et al.*, decided February 5, 1952, in the U. S. District Court of Michigan, 52 A.L.C. 233. In that case plaintiff commenced an action in a State Court, and, in its complaint, asked for both injunctive relief and damages against a union for the commission of certain acts which it alleged were unlawful and in violation of certain Statutes of the State of Michigan. The Labor Management Relations Act was not mentioned in the complaint. The defendant removed the case to the Federal Court and the District Judge denied a motion to remand to the State Court in an opinion which has been affirmed by the Court of Appeals of the Sixth Circuit. The Court stated that the allegations contained in the complaint, if true, would constitute a violation of the Taft-Hartley Act and that there was no doubt that the case involved a question affecting interstate commerce. Even though the complaint asked for relief by way of injunction which the District Court was powerless to give, yet the Court decided that it had jurisdiction over the subject matter of the action. In rejecting the contention that state law applied, the Court stated:

“The fact that the Taft-Hartley Act applies to and prohibits the acts alleged to have been committed, is of itself sufficient to deny the applicability or relevance of state law covering the same act. The Supreme Court of the United States repeatedly held

that Congress, by its legislation, has pre-empted the field of labor relations herein involved and has closed the door to parallel state action. (Citing cases) I conclude that the complaint sets up a controversy affecting interstate commerce; that the Taft-Hartley Act prohibits the defendant's activities alleged in the complaint; and that the applicability of the Taft-Hartley Act is not affected by the recitation in the complaint that the activities violated Michigan Statutes."

This case, and those cited by it, constitute clear authority for the proposition that where Congress has pre-empted the field, action under the common law or by virtue of the statutes of the state is foreclosed. Since it is apparent that Congress has limited liability for violations of the Taft-Hartley Act to labor organizations, individuals cannot be subjected to liability merely because their conduct may give rights to a common law action or an action based upon a state statute. Particularly is this true where, as here, the appellant has elected to pursue a remedy against individuals for acts which are exactly co-extensive with those for which it attempts to hold the unions liable under the Taft-Hartley Act.

The Congressional Record does not clearly disclose what motivations may have prompted Congress in protecting the individuals which it appears to have done. Some of the debates disclose that many of those who voted for the passage of the Act exhibited a real concern for the rights of the individual worker and were motivated exclusively by desire to restrict the activities of large power combinations.

In discussing the damage provisions of the Act, one commentator has said the following:

"No provision is made by the Act for either of such suits against individuals. Thus, where the action is founded on the violation of the terms of the Act, no actions may be maintained if the complained conduct is charged to an individual, even though the same misconduct at the hands of the labor organization would give rise to a sustainable action. Nor does the fact that more than one individual participates in the misconduct create liability if such individuals do not constitute a labor organization within the definitions of the Act, notwithstanding that there exists a concert of activity. It is not the elements of concerted action or the number of persons committing the alleged offense that imparts amenability to action, but, rather, it is the determination of whether or not the aggrieved party or parties are a "labor organization" as that term is intended by the Act." Rothenberg on Labor Relations, 1949, page 649.

The doctrine of *Erie R.R. Co. v. Thompkins*, 304 U.S. 64, 82 L. Ed. 1188, does not apply to questions dependent upon the constitution, treaties, or statutes of the United States.

"When a certain statute condemns an act as unlawful, the extent and nature of the legal consequences of the condemnation, although left by the statute to judicial determination, are nevertheless Federal questions, the exceptions to which are to be derived from the statute and the Federal policy which it has adopted. To the Federal Statute and policy, conflicting state law and policy must yield." 54 Am. Jur. 975, citing *Sola Electric Co. v. Jefferson Electric Co.*, 317 U.S. 173, 87 L. Ed. 165, 63 S. Ct. 172.

V

Appellees would be unfairly prejudiced by the granting of a partial new trial which did not include the other defendants.

The power of this court to order a new trial, as to a part of a case, is not questioned where the circumstances are such as to warrant it. However, the circumstances do not warrant the granting of partial new trial in this case, even if this court does find that there was reversible error in the court below. Each of the cases cited by appellant in its brief, at pages 57 and 58, are cases involving verdicts in favor of the plaintiff, which were sent back by the Appellate Court for re-trial on the question of damages only, where the instructions with respect to damages constituted the only error in the court below.

In *Atkinson v. Dixie Greyhound Lines*, 143 F. 2d 477 (1944), the court below had refused to allow the jury to pass on the question of whether or not punitive damages should be awarded. In sending the case back for a new trial on this question alone, the court said that where there was error on the submission of one portion of the case and the other portions were free from error that a partial new trial might be had as to issues into which error had crept,

“Whenever these issues are entirely distinct and separable from the matters involved in other issues and the trial can be had without danger of complication with other matters . . . ”

In *Thompson v. Camp*, 167 F. 2d 733, verdict for plaintiff in an F.E.L.A. case was reversed on grounds of an erroneous instruction on damages. The Circuit Court

allowed the case to go back for new trial only with respect to amount of damages. The court says:

"It is recognized that in exercising this right of limiting the re-trial to a single issue where the other issues have previously been properly submitted and determined by a jury, the Court should proceed with caution, with a careful regard to the rights of both parties and only in those cases wherein it is plain that the error which has crept into one element of the verdict did not in any way affect the determination of any other issue . . ." 167 F. 2d at p. 734.

In *Yates v. Dann*, 11 F.R.D. 386, the court cites a number of cases in which the granting of partial new trial has been limited to the question of damages. No case, arising under the Federal Rules even remotely analogous to the instant case, has been found in which a partial new trial has been granted.

The liability of the individuals was closely intertwined with that of the unions by appellant's own choice in bringing an action in which the same allegations were made against both groups. The allegations made by the appellant, with respect to the intentions and activities of all of the parties, are such as to make the individuals and the unions inseparable upon any analysis of the fact situation. The same evidence which is introduced to create liability on the part of the unions tends to impart liability to the individuals, and, conversely, since the individuals are alleged to be agents of the union, their activities affect the liability of the unions.

One authority has stated in accordance with the cases cited by the Appellant, as follows:

" . . . where the practice permits a partial new trial it may not properly be resorted to unless it clearly appears that the issue to be retried is so distinct and separable from the others that a trial of it alone may be had without prejudice." 3 Moore's Federal Practice 3248-9.

See also *Kessans v. Kessans*, 58 Ind. App. 437, 108 N.E. 380, where the court held that in determining whether or not a new trial could be had on a cross-complaint alone and not on an original complaint that the test is whether or not:

"the evidence necessary to support the issue presented by one pleading must necessarily affect and relate to the issue presented by the other."

in determining whether or not a partial new trial was to be granted.

The best evidence that a new trial as to the individuals alone would be prejudicial to them is the fact that a jury verdict was brought in in their favor, in a case in which the activities of the union officials materially affecting the dispute, was presented. Obviously, then, it is ridiculous for the appellant to say that the absence of evidence of the activities of the unions would not be prejudicial. The jury might well have found and on a re-trial, if one should be granted, might well find that the individuals acted spontaneously without any concert of action or conspiracy, but at the instigation of officials of the union, who engineered and planned the conditions which resulted in appellant's damage. To say this is not to admit that this is actually the case, but is merely to point out the probable importance of the activities of the union

officials in the jury's determination either as to the concert of action, which the jury might find to have existed or as to the liability of each individual for damages, which the jury might find to have been caused by the alleged agents of the union, acting in an official capacity and assess against the union. It does not lie in appellant's mouth to say that a case could have been brought against the individuals alone, in view of its choice to proceed in the way in which it has done, obviously under the impression that the bringing in of the assault and battery cases and evidence of violence on the part of the individuals would lead to a better result for it against both the unions and the individuals.

As has been previously shown, the attempt to separate the individuals from the unions, insofar as the findings on damages were concerned, was made by the attorneys for the individuals rather than the appellant.

CONCLUSION

No realistic appraisal of the outcome of the trial in the court below can leave out of consideration the natural reaction of an American jury to the choice presented to it by the appellant.

The individuals could not and should not be held liable for the total damages which are alleged to have resulted from the conspiracy of which they could not have been an integral part. The choice presented to the jury by appellant was either to hold that each individual played such a part or to free him entirely, and, in choos-

ing the latter course, the jury affirmed the principles of individual responsibility which have been paramount in all humane societies.

Respectfully submitted,

PETERSON & POZZI
FRANK H. POZZI
SIDNEY I. LEZAK

Attorneys for Appellees

United States
COURT OF APPEALS
for the Ninth Circuit

INTERNATIONAL LONGSHOREMEN'S &
WAREHOUSEMEN'S UNION (CIO) and
INTERNATIONAL LONGSHOREMEN'S &
WAREHOUSEMEN'S UNION, LOCAL 8,
Appellants,
vs.

HAWAIIAN PINEAPPLE COMPANY, LTD.,
a corporation,
Appellee.

HAWAIIAN PINEAPPLE COMPANY, LTD.,
a corporation,
Appellant,
vs.

MARTIN E. ADEN, et al,
Appellees.

Brief of Appellee Hawaiian Pineapple Company, Ltd.

On Appeals from the United States District Court
for the District of Oregon

KRAUSE & EVANS
GUNTHER F. KRAUSE
DENNIS LINDSAY
GERALD H. ROBINSON
916 Portland Trust Building
Portland 4, Oregon
Attorneys for Appellee
Hawaiian Pineapple Company, Ltd.

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United States
COURT OF APPEALS
for the Ninth Circuit

INTERNATIONAL LONGSHOREMEN'S &
WAREHOUSEMEN'S UNION (CIO) and
INTERNATIONAL LONGSHOREMEN'S &
WAREHOUSEMEN'S UNION, LOCAL 8,
Appellants,

vs.

HAWAIIAN PINEAPPLE COMPANY, LTD.,
a corporation,
Appellee.

HAWAIIAN PINEAPPLE COMPANY, LTD.,
a corporation,
Appellant,

vs.

MARTIN E. ADEN, et al,
Appellees.

Brief of Appellee Hawaiian Pineapple Company, Ltd.

On Appeals from the United States District Court
for the District of Oregon

JURISDICTIONAL STATEMENT

For a statement of the pleadings and facts disclosing
the basis upon which the District Court had jurisdiction,
we refer the Court to the jurisdictional statement in the

opening Brief (pp. 1-5) of the Hawaiian Pineapple Company, Ltd. (hereinafter referred to as "Hapco") on our cross-appeal herein.

The assertion in appellants' brief that they "do not concede" (Br. 4) the jurisdiction of the District Court disregards the facts that valid jurisdiction was obtained over the persons of International and Local 8, and that valid jurisdiction over the subject matter was obtained under Sec. 303 of the Labor-Management Relations Act, 1947 (hereinafter referred to as the "Act") 61 Stat. 158, 29 U.S.C.A. (Supp. 1952), Sec. 187, by appropriate allegations that appellant labor organizations engaged in various activities affecting commerce in violation of Sec. 303 (a) (1) and 303 (a) (4) of the Act as a result of which Hapco was injured in its business and property (Tr. 57-63).

STATEMENT OF THE CASE

We are unable to accept any part of appellants' statement of the case in which they purport to summarize the evidence. We suggest to this Court that appellants' statement is inaccurate, incomplete, and highly misleading.

To avoid repetition we respectfully first refer the Court to the statement on pages 15 to 31, inclusive, of our Brief on the cross-appeal. To this statement we shall add herein the evidence relating to activities of International and Local 8, which was omitted from our previous Brief, and shall then specifically controvert appellants' statement.

A. Activities of International and Local 8

We submit that the jury would have been warranted in finding from the testimony and exhibits the facts set out hereafter.

[Commencement of Boycott]

On August 21, 1949, three days before Hapco's chartered ocean-going barge YFN with its cargo of approximately 115,000 cases of pineapple worth more than \$680,000.00 left Honolulu for the San Francisco Bay area, the representative of International in Hawaii, Schmidt, cabled the Regional Director for International in Seattle, Gettings, various information concerning the barge and requested the Regional Director to ascertain if the International Longshoremen's Association in Tacoma would handle the barge there (Exhibit 1; Tr. 700, 703, 915, 918-919, 1019, 1091).¹

No attempt was made, however, to interfere with the loading of the barge in Hawaii and prior to its departure for the mainland, there were no disturbances or labor difficulties of any kind connected with it.² Hapco and Isle-

¹The cable (Exhibit 1) read:

"HAWN PINE CO HAS SECURED NAVY BARGE YFN 624 TUG ONO OR AKI WILL TOW APPROXIMATELY 3000 TON PINEAPPLE LOADED NONUNION TEAMSTERS HAULING TO BARGE NONUNION TUG CREW NONUNION DESTINATION PROBABLY SAN JOSE CANNERY OWNED HAWN PINE RR FROM TAC ASCERTAIN IF ILA WOULD HANDLE."

²At the time of the loading of the barge, Hapco had a contract with an ILWU local representing cannery and plantation employees. The cases of pineapple were transported from Hapco's cannery to the terminal of Isleways, Ltd., Pier 36, Honolulu, by

ways, its wholly owned transportation subsidiary, were not engaged in any dispute with their own employees and were not parties to the labor dispute and strike between the stevedoring companies and International and its affiliated local union (Tr. 1015-1018).

The barge originally sailed for the San Francisco area, for its cargo of pineapple was being shipped to Hapco's cannery at San Jose, California and to seven or eight other canneries in the Santa Clara area (Tr. 1019, Exhibit 188). However, it proved to be impossible to make arrangements to unload the barge in the San Francisco Bay area because of the certainty that the ILWU would boycott it (Tr. 1020). Accordingly, when the barge was a day or so out of San Francisco, it was diverted to Puget Sound and the Port of Tacoma where longshore work was done by members of the International Longshoremen's Association affiliated with the American Federation of Labor (Tr. 1020-1021). The barge arrived off Tacoma on September 8.

Meanwhile, the Regional Director of International in Seattle, Gettings, had been on the lookout for the vessel and had been in touch with officials of International in San Francisco (Exhibits 2 and 5). In an interview which was later published in *The Seattle Post Intelligencer*, the Regional Director stated that the barge was loaded under strike conditions in the Hawaiian Islands and hence was considered "hot cargo", and he served notice on behalf

Hapco drivers affiliated with the ILWU and by union employees, affiliated with the AF of L, of a trucking company and were loaded on board the barge by terminal employees of Isleways (Tr. 1015, 1017).

of his union that the barge would be picketed wherever she docked in the Puget Sound area (Tr. 493-495, 706, Exhibit 2). After the barge arrived in Puget Sound, the Regional Director contacted a number of other unions; the International Longshoremen's Association, the Marine Firemen and Watertenders, the Marine Cooks, and possibly the Masters, Mates & Pilots. The Regional Director admitted telling these other unions and particularly the ILA that the barge had been loaded by nonunion labor in the Hawaiian Islands and that it would be picketed if an attempt was made to unload it (Tr. 705-710).

When Hapco contacted the ILA in Tacoma to arrange for the unloading of the barge, they refused to handle the cargo (Tr. 1022-1024).

Although the Regional Director denied that the ILA had agreed that they would not unload the barge, the representative of International in Hawaii later wrote the Regional Director in Seattle that we "are grateful that the pineapple barge has not been unloaded" and that he "*hoped the ILA boys will hold fast to their word not to touch that cargo*" (Exhibit 3).

The International representative for Hawaii also advised that:

"... the strike is still effective and it will remain so as long as Matson's ships are tied up there and there is no resumption of operations between here and West Coast ports". (Exhibit 3).

Being unable to unload in Tacoma, Hapco was once again forced to seek a port where the ILWU did not operate and finally made arrangements with the Port of The

Dalles at The Dalles, Oregon, on the Columbia River, whereby the latter agreed to discharge and unload the pineapple from the barge and to load it on railroad cars and trucks for shipment to California (Tr. 474-483, 496-500, 1024). The barge, which was still in Tacoma, was directed to proceed to The Dalles, where it arrived the evening of Saturday, September 24, 1949 (Tr. 1024-1025).

When the barge left the Puget Sound area, the Northwest Regional Director of International made an intensive effort to keep track of it, stating "I will make no bones about it, that we were looking for it and watching for it. That was our job" (Tr. 735). He discussed the barge with the Secretary of the International (Tr. 733). When it was reported to him that the barge had been sighted in the Columbia River, Gettings contacted Meehan, the representative of International in Oregon (Tr. 732). Meehan later called Gettings when the barge was half way up the Columbia River to Portland and was instructed to talk to the office of International about future action (Tr. 732-734, 1359-1360). The Secretary-Treasurer of Local 8 was also contacted by Bodine, an International representative on the Coast Labor Relations Committee from International's headquarters in San Francisco, who advised him that the International would send a representative to The Dalles to picket the barge and requested Local 8 to furnish an automobile and "a few persons" to help distribute and prepare the "necessary literature that goes along with such a picket line" (Exhibit 185; Tr. 817, 1300-1301).³

³The teletype in question from Bodine which was sent after the riot (Exhibit 185) also states that he advised the Secretary-Treasurer of Local 8 at the time that the matter "was of very little

[Boycott at The Dalles]

On September 23, a day before the arrival of the barge, Meehan, the representative of International in Oregon, went to The Dalles to meet with the Commissioners of the Port of The Dalles. He admitted that he was not representing Local 8 in so doing (Tr. 1254, 1348). Meehan's position was that the barge was "hot cargo" loaded by "unfair labor", that Hapco was trying to break the strike in the Hawaiian Islands and that he would picket the Port if any attempt was made to unload the barge. Meehan also threatened to stop railroad shipments to the Continental Grain Company, which was a lessee at the Port dock, and that any shipments from it which did get out would not be unloaded at the grain company's plant in Longview, Washington (Tr. 477-479, 500-502).

After the arrival of the barge at the Port dock on September 24 (Tr. 1025), Meehan and Baker, the President of Local 8, met with the Commissioners of the Port of The Dalles to persuade and threaten them again not to unload the barge (Tr. 480-485, 502-505). On this same day, September 26, a Hawaiian longshoreman from International's local union in Hawaii began to picket at the entrance to the Port dock in the company of various individual longshoremen from Local 8 (Tr. 52-54, 417, 506, 1254, 1315). The Hawaiian picket, according to the

significance and should not under any circumstances warrant any difficulties". Similar assertions were repeatedly made by various International's witnesses. So the Northwest Regional Director of International testified that he was told by the Secretary of International that "it was not worth having any trouble over the barge; that it was not important enough to get into a beef over it" (Tr. 733).

Secretary-Treasurer of Local 8, "wasn't representing Local 8", which had no Hawaiians in its membership (Tr. 1317). While these longshoremen commenced to picket the dock, Meehan, assertedly at the request of Local 8, contacted various union officials of the Railroad Brotherhoods, the Teamsters, and the Inland Boatmen about observing the picket line set up at the Port dock (Tr. 780-784, 889). By Tuesday, September 27, the picket line had grown to 75 to 100 longshoremen (Tr. 584).

On Wednesday, September 28, the President of Local 8 admittedly dispatched at least 150 to 200 individual longshoremen members of Local 8 from the union hall in Portland to picket before the entrance to the Port dock (Tr. 888-890, 1275-1276). Local 8 paid for the gasoline used by these individual longshoremen in driving to The Dalles and back and also paid for their meals while they were in The Dalles (Exhibit 184; Tr. 892-894, 1256-1257).

Besides forming a mass picket line of over 200 longshoremen before the entrance to the dock (Tr. 433-434, 506, 585, Exhibits 47-66, inc.), the longshoremen passed out circulars to the citizens of The Dalles (Tr. 371-372). These circulars (Exhibits 23 and 25) were signed by "International Longshoremens and Warehousemens Union" and were a message to the people of The Dalles that the "Big Five" of Hawaii were trying to break the Hawaiian strike by unloading their "scab pineapple" in the Port of The Dalles. Meehan confirmed that he had "something" to do with the preparation of the circulars (Tr. 808).

In a press interview⁴ on Wednesday, Meehan also repeated the charge that the pineapple barge was "hot cargo" and an attempt to break the Hawaiian strike (Tr. 419). The President of Local 8 had made similar charges to the press (Tr. 423); and the Hawaiian picket had advised the press that he was representing the "International Longshoremens and Warehousemens Union" (Tr. 424-425).

The record does not make exactly clear who was in charge of the massed pickets; Meehan advised the Assistant Chief of Police at The Dalles that he was in charge of the picketing (Tr. 594-595), whereas the Secretary-Treasurer of Local 8 stated that the officials of Local 8 were in charge at The Dalles (Tr. 1311-1312). Whoever was in command, the longshoremen massed before the Port entrance continued to increase in number and by noon there were over 200 of them stationed there (Tr. 433-434, 506, 585).

The riot, which was thereafter staged by this mob of longshoremen when they stormed on to the Port dock and assaulted Hapco's employees and damaged its property, has been recounted on pages 19 to 25, inclusive, of Hapco's opening Brief on the cross-appeal herein. Witnesses testified that the damage effected by rioting longshoremen was done by "team work" and that they marched off the dock in an orderly way after the riot, where the Mayor of The Dalles and another disinterested witness heard Meehan address the assembled longshoremen and tell

⁴In this interview a few hours before the riot on the dock, Meehan told the Editor of The Dalles Optimist "that the ILWU was born in violence and had to have violence to continue to exist" (Tr. 521).

them that "they had done a fine job" (Tr. 369-370, 461, 571, 574, 580, 660).

[Post-Riot Activities]

On the day following the riot the President of Local 8 again dispatched members of his union to The Dalles, and Local 8 again paid for their gasoline and meals (Exhibit 184, Tr. 890, 1256-1257). Some 200 to 300 members of Local 8 patrolled the streets of the City of The Dalles, terrifying the people of the community (Tr. 443, 445, 457, 416-463, 1042). Again circulars were distributed over the signature of "The International Longshoremen's & Warehousemen's Union—CIO" blaming the violence of the day before at the Port dock on the Big Five companies of Hawaii and expressing regret "for the incident of yesterday, even though we feel it was not our fault. We are accustomed to having our picket lines respected" (Exhibit 24).

The riot put a stop to the unloading of the barge, and it was not until October 19 that arrangements were again made by Hapco to load cargo from the Port dock on to railroad cars and trucks (Tr. 486, 1043). In the interim, Hapco had effected repairs to its crane and trucks and had been advised by the NLRB that the unions had dropped their contention that the pineapple was "hot" (Tr. 1038, 1040, 1043).

On October 20, however, longshoremen with "ILWU" banners but from Local 8 again officially picketed at the entrance of the Port dock, bringing an end to the unloading operation and forestalling the movement of any cargo from the dock (Tr. 488, 512, 890, 1044). This picket line

was finally removed by an injunction against International and Local 8 (Tr. 489-490, 512-513, 1043-1046). By the end of October, Hapco was finally able to commence moving its cargo by truck and by rail to its San Jose, California, plant (Tr. 1046). The barge was finally completely unloaded on November 8 (Tr. 1047).

When 22 individual members of Local 8 were arrested and indicted in the Circuit Court of the State of Oregon for the County of Wasco for the crime of riot, Local 8 put up the bail money to release the indicted men and retained counsel to defend them; and when these individuals were convicted by pleading guilty, Local 8 paid their fines and also reimbursed them for the wages which each of the convicted men lost as a result of the criminal proceedings (Exhibit 184, Tr. 895, 1259-1260, 1319-1320). Harry Bridges, the President of International, testified that the ILWU also furnished money to Local 8 in connection with the defense of the indicted longshoremen (Tr. 873-874). Local 8 also received financial contributions for the expenses it incurred in picketing at The Dalles from other ILWU unions through International (Tr. 896-898, 1258-1259, 1316-1317).⁵

⁵The Secretary-Treasurer of Local 8 teletyped Bodine at International's San Francisco office on November 8, 1949:

"WE ARE IN THE BITE PLENTY BECAUSE OF THE PINE-APPLE BARGE. WE WANT NO MORE OF IT HERE OR ANY WHERE ELSE. WUD LIKE TO HEAR AN INDICATION AT LEAST OF SOME SUPPORT FROM ILWU IN REGARD TO OUR PREDICAMENT HERE. WE ARE SICK OVER THE WHOLE DAMNED DEAL . . ." (Exhibit 185).

B. Answer to Appellants' Statement of the Case

Appellants' seven paragraph statement of the case (Br. 6-9) seems designed to convey the impression that the actions taken by International and Local 8 were justified as part of a revolt of the downtrodden serfs of Hawaii against the "Big Five" corporations which ruled the Islands, and as an effort to preserve the economic well-being of thousands of longshoremen in Portland, Oregon; and that in any event the riot, which destroyed Hapco's property and injured its employees, was only a "completely spontaneous" and sudden flareup and should not be allowed to confuse the picture.

Appellants' statement is not in accord with the facts and does not find support in the record in this case. The references to the claimed nature of the Hawaiian strike and Hapco's relation to it are not based upon testimony relating thereto given at the trial but are based upon charges which Meehan made prior to the riot in talking to a newspaperman (Tr. 537).

As to Hapco's reason for chartering the barge (Br. 7), it had orders for 68,300 cases of pineapple from processors of fresh fruit in California and required pineapple at its own plant in San Jose and was prevented by the Hawaiian strike from using an ocean freighter (Exhibit 188, Tr. 912-913, 1018). Appellants mis-state the evidence when they say Hapco's orders from its customers contained strike clauses. There is no such evidence. Appellants' record citations refer to such clauses in agreements of Hapco's San Jose plant to buy fresh fruit from California

growers and do not relate to the pineapple on the barge.

As to the barge going to the Port of The Dalles (Br. 7), the evidence shows that after unloading was impossible in the San Francisco Bay area and in Tacoma due to the ILWU, Hapco sought out a port where the ILWU did not operate (Tr. 1020-1024). The Port of The Dalles was an open port without contracts with anyone (Tr. 478). Appellants' statements as to the facilities of the Port are not verified by their Tr. 544 and 545 references. As a matter of fact, river vessels and barges regularly loaded and discharged at the Port dock where railroad cars were available; and the Port had employees that did cargo work (Tr. 474-475).⁶

As to the unloading of the barge by the Port being an "obvious threat to the economic well-being" of thousands of skilled longshoremen (Br. 8), appellants cite no evidence in the record. This is a specious claim on the part of appellants, and the evidence proving this is marshalled in point III C, *infra*.

Finally, appellants' spontaneous combustion theory of the riot (Br. 8) simply ignores all the evidence previously summarized herein and in our Brief in the cross-appeal as to the events leading up to the riot. Appellants' theory was well disposed of by the District Court, when it stated:

"I am not going to instruct that when you gather 300 men in one spot under these circumstances you can then claim it was a result of a flash of temper" (Tr. 1452).

⁶Various pictures of the facilities of the Port are shown in Exhibits 69, 70 and 71.

ARGUMENT

I.

The District Court Did Not Err in Instructing the Jury on, and in Submitting to Them, the Issues of Whether Certain Agents and Representatives of International and Local 8 Performed Any Acts Charged and, If So, Whether They Were So Authorized or Ratified as to Be Binding on International and Local 8. (Answer to Specification of Error 1)

In accordance with Section 301 (b) of the Act that a labor organization "shall be bound by the acts of its agents," the District Court instructed the jury at length on the applicable law of agency (Tr. 1418, 1432-1434), specifically charging that Hapco was "required to prove the existence of an agency relationship as to each officer or agent involved and the existence and extent of the authority" (Tr. 1433).⁷

⁷Section 301 (e) of the Act, which like Section 301 (b) noted above, is made applicable by Section 303 (b) to damage suits thereunder, provides that "in determining whether any person is acting as an 'agent' of another person so as to make such other person responsible for his acts, the question of whether the specific acts performed were actually authorized or subsequently ratified shall not be controlling."

Senator Taft, the author of the Act, explained the language of Section 301 (e), which was inserted by the Joint Conference Committee of House and Senate in H. Rept. No. 510, 80th Cong., 1st Sess., was intended to restore "the law of agency as it had been developed at common law" and illustrated his statement by stating "union business agents or stewards, acting in their capacity as union officers, may make their union guilty of an unfair-labor practice when they engage in conduct made an unfair labor practice in the bill, even though no formal action has been taken by the union to authorize or approve such conduct." 93 Cong. Rec. 6859 (June 12, 1947).

As part of its instructions, the District Court stated:

"The evidence shows that during the time covered by the controversy Louis Goldblatt was an officer and Matt Meehan, William Gettings, Henry Schmidt and Howard Bodine were agents and representatives of the Defendant International, and that Robert Baker and Wilfred Mackey were officers, and that Toby Christiansen and Matt Meehan [1721] were agents and representatives of Defendant Local 8. *It is for you to say whether what they did, if anything, in committing or assisting in the commission of the acts charged, or any of them, or in entertaining any objects or purposes, if you find that such acts were committed or that such objects were entertained, was within the scope of their employment.*" (Emphasis supplied) (Tr. 1432)

Appellants objected to the first sentence of this instruction and have made it their Specification of Error 1A herein, on the specific grounds that Meehan, Gettings, and Schmidt were employees and not agents of International, that Bodine was not even an employee, and that the question of whether these individuals were agents was for the jury (Tr. 1462). It should be noted and it is significant that the appellants in their brief (Br. 10, 21) have omitted the last sentence of this particular charge, where the Court submitted to the jury the questions of not only whether the named individuals had committed or assisted in the commission of any of the acts charged, but also whether such acts were within the scope of their employment as agents.

Appellants have also objected and made it their Specification of Error 1B herein to the failure of the District Court to give their proposed instructions No. 7, 28, 33, 37 and 38 relating to agency matters.

The flaw running throughout appellants' argument is that they have failed to distinguish between the relationship of Meehan, Gettings and other individuals to International or Local 8, on which the evidence is undisputed, and the authority of these individuals to bind International or Local 8 by their actions, on which the evidence is disputed and was accordingly submitted to the jury. Much of appellants' argument is directed towards showing that any acts by the individuals involved would not have been binding on either union, but this is a question of whether these individuals acted within the scope of their authority and it was specifically left to the jury by the Court's instructions.

A. The Named Individuals were Undisputedly Agents and Representatives.

In objecting to the instructions of the District Court, appellants excepted specifically only to the naming of Meehan, Gettings, Bodine and Schmidt as agents and representatives of International (Tr. 1462). No objections were taken to the listing of Goldblatt as an officer of International, of Baker and Mackey as officers of Local 8, and of Christiansen and Meehan as agents of Local 8; and no argument is made in appellants' brief with respect to so listing these individuals.

The District Court named Meehan, Gettings, Bodine and Schmidt as agents and representatives of International, because, as it has stated, the evidence showed "without cavil" they were so, and there was "no evidence to the contrary" or "no attempt to prove the opposite" (Tr. 167). There was thus no question of fact to

be submitted to the jury as to the representative status of these individuals. cf. *Small Company v. Lamborn & Co.*, 267 U.S. 248, 254 (1925); 53 Am. Jur. 153, Trial, Sec. 177.

With respect to Meehan, it was admitted by appellants in the Pretrial Order that at all times involved in this case Meehan was a paid employee of International assigned to work in Oregon (Tr. 51).

The record shows that at all times Meehan was the "representative" of International (Tr. 477, 759, 760, 813, 869, 1250-1251, 1335). His specifically assigned and authorized duties included the rendering of assistance to any local union affiliated with International (Tr. 760, 800-802, 849, 1251-1252, 1322-1323, 1324, 1335-1336). Many of the acts taken by Meehan as the representative of International have previously been set out in our statement of the case, and are important in connection with the light they throw on the fact that at all times Meehan was not acting as an individual on his own behalf but was representing both International and Local 8. Even in the letter which International addressed to Meehan two months after the riot in which they purported to describe his authority (Tr. 1215-1217), it is made clear that his authority and duties included the rendering of assistance to local unions upon their request and the implementing of International policies.

With respect to Gettings, the evidence showed that he was the Northwest Director of International with jurisdiction over the territories of Oregon, Washington, British Columbia and Alaska, whose duties included the

execution of policies made by the Executive Board of International (Tr. 700-702). It was Gettings who initially dealt with Schmidt, the International representative in Hawaii, with respect to preventing the pineapple barge from being unloaded in the Northwest (Exhibits 1, 2, 3 and 4; Tr. 703-704); and it was Gettings who contacted the International Longshoremen's Association and other unions with respect to the barge, who acted as the spokesman for the ILWU in dealing with the press in Seattle about it, and who kept in touch with the headquarters of International in San Francisco and with Meehan and with Mackey, the Secretary-Treasurer of Local 8, concerning it (Exhibit 5; Tr. 491-495, 707-708, 711-712, 732-735, 1358-1359).

The record also shows that Schmidt was the representative of, and organizer for, International in Hawaii (Tr. 703-704) and hence occupied the same position and had the same duties as Meehan. It was Schmidt who initiated the entire boycott of Hapco and his status is clearly reflected in his communications to Gettings (Exhibits 1 to 5, inc.). Bodine was an International representative on the Coast Labor Relations Committee set up under the Pacific Coast Longshore Agreement, 1948-1951. His duties involved the settlement of disputes under the ILWU contract, and his office was at International's headquarters in San Francisco (Exhibit 21; Tr. 1300-1301). He held various conversations and was in communication with Meehan, Mackey and Gettings concerning action to be taken against the barge (Exhibits 5, 185; Tr. 773, 817, 1302-1304).

It thus appears from the record that the position of each of these individuals and their relationship to International was such that they were at all times persons who acted for and in the interests of International and were in fact agents. See Restatement of Agency, Sec. 1. Appellants, however, assert in their brief that there was a conflict of evidence with respect to the agency relationship of each of these individuals. An examination of the record references given by appellants to support their contention discloses that they do not in any respect support the position of the appellants and are material only on the issues of whether these individuals acted within the scope of their authority when they engaged in various activities.

Appellants say that there was evidence that Meehan represented only Local 8 (Br. 22), but the supporting record references (Tr. 1197-1198, 1335, 1336-1337, 1348) are to the testimony of Meehan and of Goldblatt, Secretary and Treasurer of International, in which Meehan testified he was occasionally called on in his capacity as International's representative to render specific assistance to local unions and Goldblatt stated that one of the duties of a representative of International was to assist local unions on specific problems. Thus, even where International's representative is assisting a local union, he is performing a part of his job as a representative of International. In view of Meehan's testimony that the scope of his employment included the rendering of aid and assistance to locals (Tr. 760, 800-802), his further testimony that he was acting for Local 8 at The Dalles

(Tr. 1348) does not raise any issue as to his being a representative of International in the first place, though certainly it does on the question of whether the scope of his authority was such that his actions in assisting Local 8 would bind International as well as Local 8.

Next, it is said (Br. 22) that there was evidence that showed International exercised no control over Meehan with respect to matters which occurred at The Dalles. Even if this were true — and there is an overwhelming mass of evidence that it is not (Tr. 732-734, 775, 1204-1206, 1213-1214, 1358-1359) — it does not help the appellants for it bears upon the question of whether Meehan was acting within the scope of his authority and not upon the question of whether Meehan's position was such that he was an agent.

As for Schmidt, appellants say (Br. 22) that the testimony of Gettings shows that he was not the agent of International with respect to the matters that occurred at The Dalles. This testimony (Tr. 704) was only to the effect that Schmidt was not an officer of the ILWU. As for Gettings, appellants assert (Br. 23) that his own testimony proves he was not an agent of International with respect to The Dalles incident, but the cited testimony (Tr. 700-704) was quite the opposite, for he stated that he was the Regional Director of the ILWU for the Northwest (Tr. 700) and that his duties included the carrying out of the policies of the leadership of International (Tr. 701).

In this state of the record, appellants then assert (Br. 24) that "no matter how conclusive the evidence, a fail-

ure to permit the jury to resolve the question requires a reversal", and cite *United Brotherhood v. United States*, 330 U.S. 395 (1947). That case was a criminal prosecution for a conspiracy to violate the Sherman Act, in which the Supreme Court held that the agency provisions in Section 6 of the Norris-LaGuardia Act were applicable. The Court pointed out that in a criminal case "... a judge may not direct a verdict of guilty no matter how conclusive the evidence" (330 U.S. at 408). The present case is not a criminal prosecution but a civil suit for damages and one in which the statutory test of agency was specifically designed to avoid any possible application of the *United Brotherhood* case.⁸

B. The Disputed Issues of Agency Were Submitted to the Jury.

The District Court positively required the jury to find that persons named by it were acting within the scope of their authority before the unions, or either of them, could be held responsible for any of their acts (Tr. 1432). Thus the Court aptly summarized many of its previously given

⁸Thus Senator Taft, in his analysis of Sec. 301 (e), stated:

"It is true that this definition was written to avoid the construction which the Supreme Court in the recent case of *United States against United Brotherhood of Carpenters* placed upon section 6 of the Norris-LaGuardia Act which exempts organizations from liability for illegal acts committed in labor disputes unless proof of actual instigation, participation, or ratification can be shown. The construction the Supreme Court placed on this special exemption was so broad that Mr. Justice Frankfurter, speaking for the dissenting minority, pointed out that all unions need do in the future to escape liability for the illegal actions of their officers is simply to pass a standing resolution disclaiming such responsibility. The conferees agreed that the ordinary law of agency should apply to employer and union representatives." 93 Cong. Rec. 6859 (June 12, 1947)

and more detailed agency instructions when it charged the jury that "the question is one of fact, as far as this case is concerned, as to whether in the things he is proven to have done he was authorized, or that the matters fell within the general scope of his agency, or whether the International expressly ratified his acts thereafter with the intention to do so and with knowledge of the facts" (Tr. 1434).

Under the instructions of the Court, the entire issue of the responsibility of either or both unions, or the actions, if any, of any of the individuals named by the Court, was left to the jury to determine. Stating what the evidence unequivocally showed with respect to the relationship of each of these individuals to International or Local 8 in no way deprived the appellants of their unquestioned right to have a jury trial upon contested issues of fact.

To the contention of appellants that the jury might have found that it was the acts of Meehan, Gettings, Schmidt or Bodine which resulted in imputed liability to International (Br. 26, 27), we reply that this would not be due to the Court's naming them as agents and representatives of International, but rather it would have been the result of finding them to have engaged in prohibited acts and that the scope of their employment or later ratification was such as to make the union liable.

C. Appellants' Proposed Instructions Were Properly Refused.

Appellants' proposed instruction No. 7 (Tr. 1483-1484) was erroneous in that it set up a test of "prior authorization" for determining the responsibility of a prin-

principal for an agent's acts. This was more in keeping with Section 6 of the Norris-LaGuardia Act rather than the common law principles of determining the liability of a union for the acts of its agent, incorporated in Sec. 301 (e) of the Act. Under common law principles the authority of an agent to bind his principal is not limited to prior authorization or subsequent ratification. 2 Am. Jur., Agency, Sec. 86 and 101, pp. 70, 82. The proposed instruction was also properly refused by the District Court as requiring a comment on the evidence with respect to the "humane motives" of International in helping out individuals in trouble (Tr. 1392).

Appellants' proposed instructions No. 28, 33 and 38 incorporate appellants' contention that Meehan was solely the agent of Local 8 and that the International was accordingly not liable for his actions. These requested instructions were not justified under the evidence, though they were in fact covered in instructions given to the jury. Thus the Court presented to the jury the issues of whether Meehan had engaged in any of the acts charged and, if so, whether they were within the course and scope of his employment. To determine this latter issue, the Court instructed that the jury was to consider whether "the acts were done when the official was pursuing the business of the union who was his particular principal" (Tr. 1432). Proposed instruction No. 33 also was improper in that it stated as a rule of law, rather than posing as a question of fact, whether Meehan could act for Local 8 without in any way binding International.

Appellants' proposed instruction No. 37 dealing with the right of International to limit Meehan's authority was covered by the Court when it charged that "the International at any time had the full right, ability, authority and power to limit the authority of any agent, even though he remained on the payroll of the International" and that "it also had the power to discharge him" (Tr. 1434).

D. The Juneau Spruce Case.

Agency matters involved in this case are strikingly similar to those resolved by this Court in *International Longshoremen's & Warehousemen's Union v. Juneau Spruce Corporation*, 189 F. (2d) 177 (1951), *aff'd* 342 U.S. 237 (1952). A suit for damages under Sec. 303 (b) of the Act was brought against International and its local in Alaska for a violation of Sec. 303 (a) (4) (jurisdictional dispute). An issue in the case was whether International was responsible for the damages inflicted on the plaintiff by reason of the activities of its "International representative" in Alaska, one Albright. The trial court instructed the jury on agency much along the same lines as the District Court herein, in part stating:⁹

"It is undisputed that Germain Bulcke, John Berry and the witness Vern Albright were, during the time covered by this controversy officers of International, hence they were agents. But it is for you to say, whether what they did, if anything, in committing or assisting in the commission of the acts charged, or any of them, if you find that such acts were committed, was within the scope of their employment."

⁹Court's instruction to the jury No. 4, Transcript of Record, pp. 49-50, Appeal No. 12527. See also supplementary instructions No. 3 and 4, Transcript of Record, pp. 1101-1103.

In that case, too, International contended that Albright was not an officer but an employee of International. The plaintiff, like Hapco herein with respect to Meehan, maintained that it was part of Albright's duties as International's representative to assist the local union and when he was doing this he was acting as an agent of International and within the scope of his authority.¹⁰ This Court affirmed a judgment for the Juneau Spruce Corporation and upheld the instructions of the Court to the jury. In its opinion, the Court noted that although Albright and Berry were referred to as officers rather than as employees, "we hardly see how this could be prejudicial as *they were in fact agents* and the Trial Court referred to them as officers only as a step to classifying them as agents". (Emphasis supplied) (189 F. (2d) 177 at 189).

Another case involving similar agency questions to the one at bar was recently decided by the Court of Appeals for the Eighth Circuit. *United Electrical, Radio and Machine Workers v. Oliver Corp.*, 205 F. (2d) 376 (June 9, 1953). Suit was brought against a local union and an International union for breach of their contract by striking in violation of Sec. 301 (a) of the Act. According to the Court of Appeals, the evidence showed that one Hobbie was a representative of International union with the duty of assisting and advising locals in his district. In the discharge of the duties entrusted to him, Hobbie was viewed by the court as a representative of both the local

¹⁰Brief of Appellee Juneau Spruce Corporation, p. 72, Appeal No. 12527.

and the International. The court upheld instructions to the jury that the issues of liability with respect to International were:

“Whether Charles W. Hobbie induced or promoted the strike, and whether in so doing he was acting within the scope of his agency as an agent for the International union.” (205 F. (2d) at 386)

We submit therefore that upon the basis of the evidence and the authorities the District Court properly submitted to the jury the only agency fact issues presented in this case, namely, whether the named individuals who were in fact agents of International or Local 8 engaged in any prohibited acts within the course and scope of their employment so as to bind the union which was his or their principal.

II.

The Verdict Against Appellant Unions is not Inconsistent (Answer to Specification of Error 7).

Appellants' argument (Br. 28-35) that there was inconsistency in the verdict against the unions but in favor of the individual defendants runs counter to the long established rule enunciated in many federal cases that logical consistency in verdicts is not required. *Dunn v. U.S.*, 284 U.S. 390 (1932); *Jayne v. Mason & Dixon Line*, 124 F. (2d) 317 (CA 2, 1941); *Telfian v. Sanford*, 147 F. (2d) 945 (CA 5, 1945), cert. denied 325 U.S. 869; cf. *Clark v. Langsburch*, 38 F. Supp. 729 (D.C. 1941), aff'd 127 F. (2d) 331 (CA D.C. 1942).

All that is legally necessary for a verdict is that it be sustained by the evidence. The verdict against the appel-

lant unions was supported by substantial evidence, as witness the concise summary thereof which the District Court has set forth in its opinion (Tr. 157-163).

Moreover, appellants' whole argument of inconsistency is based upon the false premise that "the liability of International and Local 8 can only derive from the liability of the individual defendants" (Br. 29), from which the unwarranted conclusion is drawn that since the individual defendants were exonerated the unions cannot be held liable.

The liability of the unions did not by any means necessarily depend upon the actions of any or all of the individuals who were actually charged as defendants. There were many individuals who were not named defendants but upon whose activities the jury might well have predicated the liability of the unions: the more than 100 other longshoremen, besides the individual defendants, who picketed the entrance to the Port dock and who went onto the dock to stage a riot (Tr. 433-434, 450-451, 506, 585); the Hawaiian picket, Fred Kamahoahoa, who was present in forestalling Hapco's attempted unloading at Tacoma and was later flown by International to The Dalles where he picketed from September 26th¹¹ on; and International's Gettings, Schmidt, Bodine and Goldblatt, whose participation has been previously noted. Hapco's case against the unions was not limited, as appellants suggest (Br. 28), to the events occurring during the relatively short time of the riot at The Dalles. As

¹¹See Exhibits 2, 184 (check No. 173), 185; Tr. 424-425, 709-710, 731, 894, 1295, 1303-1305, 1315, 1317, 1361-1362.

charged and proved, the gist of Hapco's case against the appellant unions was a continuing violation of Sec. 303 of the Act commencing prior to the arrival of the barge at The Dalles and ending approximately on October 31, 1949, more than a month after the violence at The Dalles (Tr. 57-63).

Even in the master and servant cases where a servant is exonerated but the master is held under the rule of respondeat superior, courts have always held that the verdict is not inconsistent where the alleged damage could have been caused by the acts of other servants or agents. *Southeastern Greyhound Lines v. McCafferty*, 169 F. (2) 1 (CA 6, 1948) cert. denied, 335 U.S. 861 (1948); *Fish v. Southern Pacific Co.*, 173 Or. 294, 143 P. (2d) 917 (1943); *Mid-Continent Petroleum Corp. v. Epley*, Sup. Ct. Okla., 250 P. (2d) 861 (1952); *Newman v. Fox West Coast Theatres*, 86 Cal. App. (2d) 428, 194 P. (2d) 706 (1948); Annotation, 78 A.L.R. 365; Annotation, 54 L.R.A. 649; Compare: *Dixie Ohio Express Co. v. Poston*, 170 F. (2d) 466 (CA 5, 1948).

So, for example, Local 8 could have been bound by the acts of its members, other than those charged as defendants herein, whom it dispatched to picket at The Dalles on September 26, 27, 28 and 29, and again on October 20 to October 26 (Tr. 888-890); or by the assistance which it was asked to give and did give to the Hawaiian picket (footnote 11, supra); or by its subsequent conduct with respect to its members indicted for riot by posting their bail, paying their fines upon conviction and their wages for lost time, all of which could have been

construed as a ratification of their actions (Exhibit 184; Tr. 895, 1259-1260, 1318-1320).

Likewise, as charged by Hapco (Tr. 57), International could act and be bound through the agency of Local 8 in the acts of the latter's representatives. *Brown v. Oil Worker's International Union*, 80 F. Supp. 708 (N.D. Calif., 1948); *Smith v. International Printing Pressmen*, 145 Tex. 399, 198 S.W. (2d) 729 (1946). International could similarly be bound by the acts of Local 8 for which the latter was responsible by reason of having been a "conspirator" with Local 8, as contended by Hapco (Tr. 57). The jury could have also found that International had ratified the actions of Local 8 and its various members at The Dalles from evidence as to the funds collected by or through International and disbursed to Local 8 for the expenses it incurred in connection with the barge.

There could not, in any event, be any inconsistency between the verdict as to the unions and the individual defendants because, as submitted by the District Court to the jury, the liability of the unions and of the individuals depended upon different findings of fact. The District Court has itself clearly recognized this fact in rejecting appellants' claim of inconsistency, stating:

"Here the charge involving the individuals is a conspiracy to effect unlawful acts. The individuals may have done or assisted in doing the acts; the unions may have been found to have done the acts and thereby have incurred responsibility; but the mere fact that certain individuals who may have done certain acts were not found to have entered into a conspiracy with the union to do them is of

no consequence. The liability would have been on entirely different grounds. . . . *the Court placed a somewhat greater burden upon Pineapple as to these individuals. Since there was a greater degree of proof required as to the individuals than as to the unions, there can be no inconsistency in the diverse findings.*" (Tr. 163-165). (Emphasis supplied)

The liability of appellant unions was submitted to the jury on the basis of whether either or both of them had violated Sec. 303 (a) (1) of the Act (Tr. 1415, 1418-1435). The jury was then instructed in substance that only if one or both of the unions were found liable under the Act could the liability of the individual defendants be considered (Tr. 1435, 1440) and that an individual defendant could only be found liable if he was a member of a conspiracy between either or both of the unions and the individual defendants (Tr. 1436-1437, 1438, 1440).¹² A different basis for determining the liability of the unions and individuals having been submitted to the jury, it was possible for them to return different verdicts which were not contradictory.

In apparent recognition of the different bases upon which the liability of the unions and the individual defendants was submitted, appellants suggest (Br. 33-35) that the "conspiracy" required of the individuals was only

¹²In Hapco's cross-appeal as to the verdict in favor of individual defendants, it is contended that the District Court erred in failing to submit to the jury the issue of the common law liability of the individual defendants for their unlawful acts causing damage to Hapco, separate and apart from the issue of their liability as co-conspirators with the unions. Had this been done, it is even clearer that there would be no basis for any claimed inconsistency in the verdict for the bases of liability of the unions and of the individuals would have been even more different.

a "concert of action" to do unlawful acts with the unions and that the jury's verdict meant it found no such concert of action. So, if the individual defendants didn't engage in such acts, say appellants, the unions couldn't be bound by them, and the verdict against the unions is inconsistent with the one for the individuals. The District Court, of course, did not give any such limited instructions on the nature of the "conspiracy" to which an individual had to belong in order to be liable (See Tr. 1435-1440). In addition it is clear that appellants' argument again rests on the same premise that the liability of the unions could only derive from the individual defendants, which as we have shown above, is not true.

III.

The District Court did not Err in Instructing the Jury Concerning the Labor-Management Relations Act, 1947.

A. The Instructions Considering Hapco as an "Employer" Under Sec. 303 (a) Were Proper, Because Hapco was not Involved in any Labor Dispute With Appellants (Answer to Specification of Error 4A and 4C).

1. Appellants' Objections.

The District Court instructed the jury, in part, that Hapco would be entitled to recover if the jury found that one or both appellants induced or encouraged the employees of Hapco to engage in a concerted refusal in the course of their employment to perform any services in connection with the cargo of pineapple, with the object of forcing or requiring Hapco to cease doing business with certain specified persons and that as a result thereof

Hapco sustained damage to its business or property (Tr. 1424-1425).

Appellants objected to this instruction and raise it herein as their Specification of Error 4A, on the specific ground that Hapco could not be deemed an "employer" whose employees were induced to engage in a concerted refusal because Hapco was the "primary employer" and Sec. 303 of the Act does not apply to the inducing of employees of the "primary employer" (Tr. 1454-1455).

In a similar vein, appellants objected to the failure of the Court to give their requested instruction No. 29¹³ and have made it their Specification of Error 4C herein, on the ground that there was "evidence from which the jury could find that this was a primary boycott against a corporation [Hapco] which was so intimately connected with those that were involved in the strike in Hawaii that the jury would have a right to find that this was a primary boycott" (Tr. 1453).¹⁴

¹³Appellants' proposed instruction No. 29 provided:

"If you find that there was a primary strike against Castle and Cook and that Castle and Cook owns and controls the Hawaiian Pineapple Company to such an extent as to dominate its business practices and policies, then I instruct you, that you may consider Castle and Cook as the primary plaintiff herein. If you should so find then I further instruct you, that the strike or boycott in this case is a primary strike or boycott and you may not award any damages against the defendant, save and except for the actual destruction of property or personal injuries sustained."

¹⁴In Specification of Error 4C, appellants also object to the failure of the Court to give their proposed instruction No. 30 (Tr. 1487) that the Hawaiian strike was a "lawful strike, not in violation of any law of the United States or of Hawaii" and that trade unions were favored by public policy of the United States. Appellants did not make any specific objections on this ground as required by Rule 51 of the Federal Rules of Civil Procedure, to the actual in-

2. *No Labor Dispute Between Hapco and Appellants.*

The short and complete answer to the contention that Hapco was itself the "primary employer" with respect to International and Local 8 is that there is no such evidence in the record.¹⁵

Neither International, Local 8 nor the Hawaiian Local affiliated with International had any direct relationship or connection, by employment or otherwise, with Hapco or with Isleways. Admittedly Local 8 and the Hawaiian Local, whose activities extended only to representing longshoremen in Oregon and in Hawaii, respectively, had nothing whatsoever to do with the wages, working conditions or representation of the employees of Hapco and Isleways; and there is no evidence that International had any contact with these companies or made any demands upon them. Hapco's employees were represented by a cannery and plantation workers local affiliated with the ILWU; Isleways' employees were not represented by any union (Tr. 1015).

structions given by the Court. In any event, the Court did instruct that trade unions were favored (Tr. 1418) and had previously indicated, prior to instructing the jury, that it would not instruct them that the Hawaiian strike was lawful for the reason that there was no such evidence in the case (Tr. 1399, 1401).

¹⁵In their brief (Br. 43-54) appellants constantly use, but always keep away from defining, terms such as "primary employer", "primary labor dispute", "primary activity". Our understanding of the term "primary employer" is the person with whom the union (usually representing his employees) has a basic dispute over wages and working conditions. See Dennis, *The Boycott under the Taft-Hartley Act*, NYU Third Annual Conference on Labor (1950), 367, 388.

At no time involved in this case (from August to November 1949) was Hapco or Isleways engaged, either in Hawaii or in this country, in any controversy or labor dispute of any kind with their own employees (Tr. 1015-1017). It is also a matter of record that there was no picketing or any labor disturbance of any kind in connection with the loading and dispatch of Hapco's barge in Hawaii (Tr. 1017), even though it was developed at the trial that International and the Hawaiian Local knew of the loading and of Hapco's future plans for the barge (Exhibit 1).

The only connection shown in the evidence between the appellants and Hapco was the attempt of the unions to prevent the barge from being unloaded in the United States after its departure from Hawaii. Such a connection is hardly sufficient to transform Hapco, the object of the boycott, from an employer with no relationship whatsoever to the boycotting unions into a "primary employer" against whom it is said such tactics may be used with impunity.

Perhaps in recognition of the absence of any evidence in the record of a legitimate labor dispute between the appellant unions and Hapco, the novel assertion is now put forward for the first time in appellants' brief (Br. 45) that the activities which the unions took against Hapco at The Dalles were "primary" activities, because Local 8 was concerned as to who would unload the barge, which was not clear at that time.

Appellants' lack of any record citation reflects the fact that there is no evidence to back this assertion. There

is no evidence or intimation in the record that the actual work of unloading the pineapple from the barge was ever to be done by anyone except the Port of The Dalles and its employees (Tr. 474,, 475-477). At that time there was no doubt in the minds of the appellant unions on this point, for it was only the Port of The Dalles, not Hapco, that they approached and then only, as the Commissioners of the Port of The Dalles testified, to prevent the barge from being unloaded by the Port (Tr. 477-485, 500-505). The doubt as to which employees would do the unloading work, which appellants now express in their brief so as to build up the claim of a purported primary dispute with Hapco, was never shared by the representatives of International and Local 8 at The Dalles, for there is no record of their ever having contacted Hapco with a request that they be allowed to do the work of unloading the barge at The Dalles or to discuss wages and working conditions in connection therewith.

3. No Evidence That Hapco Was Connected With Hawaiian Strike.

As to appellants' other contention that their activities against Hapco were justified as "primary activities" because Hapco was so "intimately connected" with Castle & Cook with whom International and its Hawaiian Local were allegedly engaged in a strike in Hawaii (Br. 49-54), there is once again no evidence to support this constantly repeated but never proved charge.

A summary of the evidence on this point shows that Botley, Hapco's manager of its Engineering & Plant Division and Isleways' president, testified as a witness for

Hapco that the Hawaiian strike was between the long-shoremen and the stevedoring companies of McCabe, Martin & Renney and Castle & Cook Terminals, Ltd. (Tr. 1017-1018). Appellants did not call any of their own witnesses on this point but were content with cross examining Botley and then calling him as an adverse witness. Botley's further testimony was that Castle & Cook Terminals was a subsidiary company of Castle & Cook (Tr. 1072), that he had no information if Castle & Cook Terminals was owned by Castle & Cook but that it "possibly" was (Tr. 1072), that Castle & Cook owned approximately 15 2/3 per cent of Hapco (Tr. 1073), that Castle & Cook owned approximately 26 per cent of the Helemano Company which owned approximately 33 1/3 per cent of Hapco (Tr. 1074), that the president of Castle & Cook was a vice-president of Hapco, and the president of Hapco was a director of Castle & Cook (Tr. 1073-1074).

At this point appellants sought to introduce in evidence their Exhibit 219, a manual of Hawaiian securities, which Botley was only able to identify as being used by investors. The Court sustained an objection to the exhibit on the basis that there was no proof of the authenticity of the information contained therein (Tr. 1168-1172). Thereafter, in a long colloquy with the District Court, appellants' counsel kept repeating that he could prove through Botley and Exhibit 219 that through interlocking directorates and stock ownership, Hapco was actually the "other hand" of Castle & Cook "to the end that it is actually a primary strike so far as Hawaiian Pineapple is concerned" (Tr. 1172-1177).

When appellants' counsel asked that his statements be taken as a complete offer of proof that Castle & Cook were "alter egos", the Court refused to accept this offer and instructed him to submit any offer of proof he wished. Exhibit 219 was then again offered in evidence and refused on the twin grounds that it was incompetent and that it was not a publication which was admissible in evidence (Tr. 1177-1178). Appellants then made no effort to elicit any further testimony from Botley nor did they call any other witnesses or introduce any other evidence on this subject.

Appellants have not assigned as error the refusal to admit Exhibit 219. Instead, to support their argument that Hapco was the "alter ego" of Castle & Cook, appellants' brief (Br. 50-53) cites as evidence press statements made prior to the riot by Meehan to the editor of a small weekly newspaper in The Dalles, in which Meehan said that Hapco was controlled by Castle & Cook and other members of the "Big Five" (Tr. 537, 541).

Propaganda mouthed by appellants' strike leader at The Dalles in his bid to keep the barge from being unloaded is thus later resorted to and cited as proof of the truth of the propaganda itself: Hapco and Castle & Cook are "alter egos" because Meehan said they were.

Appellants' proof reduces itself down to the mere fact that Castle & Cook had less than a majority stock ownership in Hapco. This does not make Hapco the alter ego or instrumentality of Castle & Cook even in labor relations matters. See *Press Company, Inc., v. NLRB*, 118 F. (2d) 937 (CA D.C. 1940), cert. denied 313

U.S. 595 (1941). The record is barren of any evidence that the actions of Hapco were in any way whatsoever governed by Castle & Cook or that the latter ever exercised any control over Hapco or had any connection with the cargo of pineapple. Moreover, no matter what the relationship between Castle & Cook and Hapco, there is no evidence of Castle & Cook being involved in any lawful prior dispute with appellant unions.¹⁶ Hence, there is no justification for even the Hawaiian Local, let alone International and Local 8, to picket an employer and his product with whom it had no dispute. As the District Court stated in its opinion:

“The Court rejected an offer to prove the claimed relation between Castle & Cook and Pineapple for, even if the claim be conceded, it gave neither the member of the Hawaiian local nor the unions here involved standing. International, according to its own reiterated position, had no authority over the Hawaiian local, and the Portland local, which is approximately twenty-five hundred miles away, had no ground to boycott a product with which it had no connection by employment or handling against an employer with whom none had had any relation. No decided controversy, whether by administrative board or court, holds there is any basis for protected concerted action upon the facts claimed here.” (Tr. 171-174)

¹⁶To fill this gap, appellants' Brief (p. 51, footnote 16) asserts that the lawfulness of the Hawaiian strike was to be presumed in the absence of evidence to the contrary offered by Hapco. This is incorrect. Hapco in its case in chief established a prima facie case that the appellant unions had violated Section 303 (a) of the Act and that neither International nor Local 8 had any direct relationship with it. If appellants wished to justify their activities as part of a lawful primary dispute in Hawaii, it was up to them to prove the nature and legality of this dispute.

Since there was no evidence in the record sufficient to even raise a question of fact as to the claimed relationship between Hapco and Castle & Cook and the effect thereof, there was no issue to be submitted to the jury in this connection. Accordingly, the Court properly refused to give appellants' proposed instruction No. 29.

B. The Instructions Concerning Appellants' Talks to Hapco's Truck Drivers Were Proper, Because Such Conversations Were not Privileged Under Section 8 (c). (Answer to Specification of Error 3 and 4B)

1. Appellants' Objections

The testimony showed that Baker, Local 8's President, had, prior to the riot on September 28, dispatched a patrol of four longshoremen from Local 8 to head off two of Hapco's large trucks outside The Dalles and to persuade Hapco's employees not to drive these trucks to the Port dock to pick up the cargo of pineapple for transportation to California (Tr. 677-680, 1098-1099, 1119, 1121-1122, 1125-1126, 1136 1140-1141, 1143). One of Hapco's drivers testified that the longshoremen "told us they couldn't guarantee us safe conduct" through their picket line and they "told me there was strike conditions" (Tr. 678); and one of the team of longshoremen admitted that he had told Hapco's drivers "not to go through the picket line if they were good union men" (Tr. 1143).

After advising the jury in detail of the various elements which they would have to find in order for the appellant unions to have violated Section 303 (a) (Tr. 1418-1421, 1424-1426), the Court instructed that the

jury might consider whether the conversations between the longshoremen and Hapco's truck drivers were for the purpose of inducing or encouraging Hapco's employees to take concerted action in the course of their employment to refuse to perform any services as to the pineapple, and whether it was an object of any inducement or encouragement, which they might find, to force any person to cease dealing with Hapco (Tr. 1427). The Court further instructed that these conversations should be so considered whether the longshoremen advised Hapco's drivers that the pineapple was "hot" or that the Port was threatening the working conditions and wages of the Portland longshoremen.

Appellants objected to this instruction and have made it their specification of Error 4B herein, on the ground that the longshoremen had a right under Section 8 (c)¹⁷ to tell Hapco's drivers that the Port was threatening their working conditions and to ask them not to go into the Port (Tr. 1459).

In the same vein appellants objected to and have assigned as their Specification of Error 3 herein the failure of the Court to give their proposed instructions No. 45, 46 and 47, upon the ground that they were squarely based on Section 8 (c) of the Act (Tr. 1455-1456).

¹⁷Section 8 (c) of the National Labor Relations Act, as amended, provides:

"(c) The expressing of any views, argument or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute or be evidence of an unfair labor practice under any of the provisions of this Act, if such expression contains no threat of reprisal or force or promise of benefit."

2. *Prohibited Conduct Under Section 303 (a) Not Privileged Under Section 8 (c).*

Initially appellants' objections overlook the fact that Section 8 (c) by its very language is limited to an "unfair labor practice" under "the Act", which means "The National Labor Relations Act" (Section 17). There is not here involved an "unfair labor practice" proceeding, which is limited to and always involves proceedings before the National Labor Relations Board and subsequent court action thereon. On the contrary, this is a suit for damages under Section 303. There is no provision comparable to Section 8 (c) purporting to qualify Section 303 (a), although the language of Section 303 (a) substantially duplicates the unfair labor practices of Section 8 (b) (4). See *United Brotherhood of Carpenters (Wadsworth Building, Inc.)*, 81 NLRB 802 (1949). A suit for damages under Section 303 of Title III of the Labor-Management Relations Act, 1947, is not controlled by substantive or procedural provisions of Section 8 (c) of Title I (the revision of the National Labor Relations Act).

Moreover, Section 8 (c) is not applicable, even in a National Labor Relations Board proceedings under Title I, to communications containing "a threat of reprisal or force or promise of benefit". The statements made by the team of longshoremen were of this nature. Urging Hapco's employees, who were themselves union members (Tr. 661, 677-678) not to go through a picket line which then numbered 200 to 300 longshoremen (Tr. 433-434, 506, 585), and telling them that their "safe conduct" could not be guaranteed, was both a promise of benefit and a threat of reprisal. As this Court said of Section 8 (c) in

Printing Specialties, etc. *Union v. LeBaron*, 171 F. (2d) 331 at 334 (1948) cert. dismissed, 336 U.S. 949 (1949):

"The section is inapplicable. Cf. *United Brotherhood of Carpenters & Joiners of America v. Sperry*, 10 Cir., 170 F. 2d 863 (decided November 2, 1948). It is known to all the world that picketing may comprehend something other than a mere expression of views, argument or opinion. As conducted here it constituted an appeal for solidarity of a nature implying both a promise of benefit and a threat of reprisal. The reluctance of workers to cross a picket line is notorious. To them the presence of the line implies a promise that if they respond by refusing to cross it, the workers making the appeal will in turn cooperate if need arises. The converse, likewise, is implicit. 'Respect our picket line and we will respect yours.' In this setting the picket line is truly a formidable weapon, and one must be naive who assumes that its effectiveness resides in its utility as a disseminator of information. The wisdom or policy of circumscribing the use of the weapon is not, of course, a matter with which the courts are entitled to concern themselves."

Even if it be assumed that Section 8 (c) is applicable to a private suit for damages under Section 303, it is now established that the privileges granted in Section 8 (c) are subject to the prohibitions of Section 8 (b) (4) (the comparable section in Title I to Section 303 in Title III) and that the general language of Section 8 (c) must give way to the specific prohibitions of Section 8 (b) (4). *NLRB v. United Brotherhood of Carpenters & Joiners of America*, 184 F. (2d) 60 (CA 10, 1950), cert. denied, 341 U.S. 947 (1951); *International Brotherhood of Electrical Workers, Local 501 v. NLRB*, 341 U.S. 694, 704, 705 (1951).

The specific prohibitions of Section 303 (a) are, in part, that a labor organization shall not "induce or encourage the employees of any employer" to engage in specified action with a specified object in so doing. The words "induce or encourage" have been construed by the Supreme Court to be "broad enough to include in them every form of influence and persuasion". See *International Brotherhood of Electrical Workers, Local 501 v. NLRB*, *supra*,¹⁸ where peaceful picketing by a union agent, who simply carried a placard which read: "This job is unfair to organized Labor: I.B.E.W. 501 A.F.L.", was held to fall within the ban of inducing or encouraging.

The talks by the representatives of Local 8 to Hapco's employees were clear examples of inducement or encouragement within the purview of Section 303. As such, their legality was properly submitted to the jury by the court under its carefully circumscribed instructions containing all of the elements required by Section 303 (a).

¹⁸The Supreme Court cited with approval the following definitions of "induce" and "encourage" from Webster's New International Dictionary, Unabridged (2d Ed. 1945):

"Induce: (1). To lead on; to influence; to prevail on; to move by persuasion or influence.

"Encourage: (1). To give courage to; to inspire with courage, spirit or hope, to raise the confidence of; to animate; hearten; * * *.

(2). To embolden, incite, or induce as by inspiration, recommendation, etc., hence, to advise; * * *.

(3). To give help or patronage to, as an industry; to foster;***."

C. Appellants Sham Claim of a Labor Dispute with the Port of The Dalles Does Not Justify or Affect Their Violation of Section 303 (a) (Answer to Appellants' Brief Argument IIIC and IIID).

While appellant unions did not and have not filed any appropriate specifications of error and have thus precluded themselves from claiming error in this Court, they now allege in their brief that there was a primary dispute between them and the Port of The Dalles (Br. 43-44) and that the Court failed to consider whether such a dispute existed and, if it did, its effect (Br. 45-49).

The record shows that the claim of the unions in this regard is a specious one contrived as an after-thought but that nonetheless the Court submitted it to the jury. Regardless, however, of any claimed dispute with the Port of The Dalles, the unions at the same time could under the law, and did by their activities, violate Section 303 (a) as against Hapco.

1. Specious Claim of Labor Dispute.

Appellants' brief carefully shies away from spelling out the nature of the alleged dispute with The Dalles (Br. 43-44). No claim is made that International or Local 8 wanted to organize or represent the employees at The Dalles. Nor is there a claim made that the unions wanted to have the work of unloading the barge assigned to them instead of to the employees of the Port. Instead, for the basis of the claimed dispute — hence the asserted justification for the unions' activities at The Dalles — we are referred to the testimony of Meehan made almost

two years later in Court to the effect that the Port was paying its employees lower wages and working longer hours than Portland longshoremen and was not observing a 2100-pound load limit (Br. 44).¹⁹

The speciousness of this claim is mirrored in the actual record of appellants' activities which shows that their true purpose was to boycott Hapco's cargo, and that the working conditions at the Port of The Dalles had nothing to do with their actions until it was necessary to later resort to them to escape the consequences of their earlier activities.

There was never any previous attempt made by International or Local 8, so far as the record shows, to interfere with the Port of The Dalles or its employees or their wages and working conditions in loading or unloading products at the Port dock from other barges. No mention was ever made at meetings between Meehan and Baker and the Port Commissioners before and after the arrival of the barge that International or Local 8 wanted to unload the barge or that the Port was threatening the wages

¹⁹In another part of their brief, appellants state that their activities at The Dalles were "conducted in order to secure the unloading of the pineapple barge by union members." (Br. 61). If this was the purpose of the appellant unions, then their activities herein would also have violated Section 303 (a) (4) (jurisdictional dispute) in that an object thereof would have been to have the work of unloading assigned to them instead of to the employees of the Port to which it had been previously assigned. *ILWU v. Juneau Spruce Corporation*, 189 F. (2d) 177 (CA 9, 1951), *aff'd* 342 U.S. 237 (1952).

In its amended complaint and in the Pretrial Order, Hapco had previously alleged that the activities of International and Local 8 violated Section 303 (a) (4) (Tr. 45-49, 57-58), but this charge, although an issue in the case (Tr. 68), was not submitted by the Court to the jury.

and working conditions of the Portland longshoremen (Tr. 477-485, 500-505). Instead the Port was threatened as to what would happen if it did. When picketing of the barge commenced by members of Local 8 on September 26 and continued until the riot, the longshoremen carried no signs or banners claiming that the Port was unfair to them. Only the solitary picket from the Hawaiian Local wore an armband (Tr. 1257).

In various press interviews up to the time of the riot, Meehan said that the reason for the picketing was that the pineapple on the barge was "hot cargo" loaded by nonunion labor in the Hawaiian Islands and was an attempt to break the Hawaiian strike (Tr. 418-420, 520-521). Baker gave out similar press statements (Tr. 421-423).²⁰ The circulars (Exhibits 23, 24 and 25), signed "International Longshoremen's Warehousemen's Union" and distributed by Baker and other longshoremen (Tr. 535-536) before and after the riot dealt only with the Hawaiian strike and the "Big Five" who were trying to

²⁰It is interesting to contrast the reasons given by the representatives of International and Local 8 for their activities at The Dalles with the testimony of individual longshoremen as to their reasons for going from Portland to The Dalles. The reasons given and the number of longshoremen so testifying may be grouped as follows (Tr. 78-122):

1. Fishing or for ride.....	14
2. Curiosity—	
(a) Plain curiosity.....	26
(b) Plain curiosity (knew barge was "hot")	13
(c) Curiosity as to wages and working conditions	9
(d) Curiosity to see hiring hall	2
(e) Curiosity to see who unloaded barge	6
3. To get work (but did not offer to).....	10
4. To protect own interest.....	5
5. To picket	7
6. To keep from unloading	4

unload "scab pineapple" at The Dalles. No concern was expressed for the wages and working conditions at the Port. Nothing was said by the patrol of Local 8 members, who stopped Hapco's truck driver, about wages being paid by the Port (Tr. 679). Longshore pickets at the entrance to the Port dock, who stopped all vehicles entering the dock, asked whether the drivers had any connection with Hapco (Tr. 438-439, 548). During the riot on the Port dock staged by the longshoremen, they were shouting to each other not to touch Port property (Tr. 468). Sergeant U'Ren of the Oregon State Police, who was present all during the picketing before the riot, never heard any talk about the Port breaking the working conditions of the longshoremen (Tr. 458). At a conference held after the riot with the Governor of the State of Oregon on September 30, Baker labelled the barge as "hot cargo" and wanted to get it out of the state (Tr. 464-465). Even by then, appellants' present concern over the threat to their working conditions posed by the Port had apparently not materialized.

The first that was ever heard of a supposed dispute with the Port was in the middle of October when the NLRB advised Hapco that the unions had dropped their claim that the pineapple was "hot" and claimed that their dispute "was now" with the Port of The Dalles (Tr. 1042-1043). However, when unloading was thereafter commenced on October 19th, longshore pickets again appeared and were finally removed by an injunction (Tr. 1044-1046). As revealing as any of the above incidents was the refusal of Baker to testify whether Local 8 would

have unloaded the barge, even if the Port had entered into a contract with the unions (Tr. 1262-1264, 1284-1285).

Shining through all of the activities of appelling unions there can be clearly seen their specific objective: to prevent Hapco from unloading its cargo of pineapple in the United States. Their larger purpose in boycotting this cargo was to aid their strike in Hawaii. By preventing any shipping between the Islands and the United States with the consequent disruption of the economy of the Islands, tremendous pressure could be brought upon the employers in Hawaii with whom the Hawaiian Local was disputing. Appellants' true purpose is to be seen in the words of the International representative in Hawaii, who originated the boycott of Hapco's cargo (Exhibit 1), when he wrote under date of September 19: ". . . *the strike is still effective and it will remain so as long as . . . there is no resumption of operations between here and West Coast ports*" (Exhibit 3).

We submit that appellants' "pretended labor dispute [with the Port of The Dalles] was in truth the kind of a sham by which the Courts never permit themselves to be deceived nor the law to be perverted". *Amalgamated Association, etc. v. Dixie Motor Coach Corp.*, 170 F. (2d) 902, 906 (CA 8, 1948). See also, *Bakery Drivers Union v. Wagshal*, 333 U.S. 437 (1948); *Styles v. Local 760, International Brotherhood of Electrical Workers*, 80 F. Supp. 199 (E.D. Tenn. 1948).

The District Court, which observed all of the witnesses during the long trial, has dismissed appellants'

claim of a labor dispute with the Port "as specious and not in accord with the facts" (Tr. 168), stating:

"It stands out with naked clarity that International moved to boycott this cargo for the sole purpose of exerting pressure upon the public in Hawaii by isolating the islands from the continent. The record not only establishes the boycott and its purpose, but negatives all other reasonable postulates." (Tr. 168-169)

2. *Claimed Dispute Submitted to Jury.*

As specious as appellants' claim of a labor dispute was, the District Court nevertheless submitted it to the jury, specifically instructing them that a verdict should be returned for International and Local 8 if the jury found any inducement or encouragement by them "was solely for the purpose of concerted activity on account of wages, hours, or conditions of employment, as the defendants claim, or to obtain jobs for themselves" (Tr. 1429).

Thus the claim which appellants now assert was in fact submitted to the jury, and by its verdict it must have found that the activities of the unions were not for the purposes which they now say motivated them.

Far from placing "too heavy a burden on them" as appellants now complain (Br. 47), the word "solely" in the Court's instructions was absolutely necessary. For International or Local 8 to violate Section 303 (a), it was only necessary that one objective of the inducement and encouragement they engaged in was the prohibited one of forcing any person to cease doing business with any other person; and it did not make any difference if

their activities had any other legal objectives. *NLRB v. Denver Building & Construction Trades Council*, 341 U.S. 675, 689 (1951); *Local 74, United Brotherhood of Carpenters & Joiners of America v. NLRB*, 341 U.S. 707, 713 (1951). In order for the unions to avoid the application of the Act to them by their claimed dispute with The Dalles, it was necessary that their sole purpose be one not prohibited by the Act.

3. *Violation of Section 303 (a) Regardless of claimed dispute.*

Appellants' notion throughout their brief seems to be that once given a dispute between them and the Port of The Dalles, a cloak of immunity was thereby thrown over their other activities directed against other employers and persons concerned with the unloading of the barge, these apparently being considered "secondary effects". We submit that the Act provides no such immunity and that, even if appellants' claimed dispute with the Port is assumed, it was still possible to simultaneously boycott Hapco in violation of Section 303 (a) (1).

The test of whether a union has violated Section 303 (a) (1) is always the same: Whether it has induced or encouraged the employees of any employer to engage in a concerted refusal in the course of their employment to perform any services, with at least one objective of the inducing and encouraging being that of requiring any person to cease doing business with any other person. The language of Section 303 (a) makes no reference to "primary" or "secondary" employers or activities; and we do not believe that the nomenclature test of calling a

union's activities "primary" or "secondary" is the touchstone for determining whether a union has violated this section. *Joliet Contractors Association v. NLRB*, 202 F. (2d) 606 (CA 7, 1953).

So, in the *Denver Building* case, *supra*, where a picket posted at a construction site where a union general contractor and a nonunion subcontractor were working caused the union employees to quit and eventually forced the general contractor to get rid of the subcontractor, the Court of Appeals for the District of Columbia (186 F. (2d) 326, 337 (1950)) held that no violation of Section 8 (b) (4) (a) was involved because the union's activities were primary since they occurred at the site of the primary employer. The Supreme Court reversed the Court of Appeals, 341 U.S. 675, and held that the Act was violated, irrespective of the so-called primary nature of the dispute. The Court did not attempt to determine the legality of the union's actions in terms of primary or secondary activities but looked instead to the object of the union, saying (341 U.S. at 687):

" . . . § 8 (b) (4) restricts a labor organization and its agents in the use of economic pressure where an object of it is to force an employer or other person to boycott someone else."

The effect of the *Denver* case is that the activities of a union against its primary employer are not given a blanket of immunity because they are primary. Such activities can still violate the Act if an objective of these activities is one prohibited by the statute. This is even more forcibly brought out by two other Supreme Court decisions, *International Brotherhood of Electrical Work-*

ers, *Local 501 v. NLRB*, 341 U.S. 694 (1951), and *Local 74, United Brotherhood of Carpenters & Joiners of America v. NLRB*, *supra*, where peaceful picketing in primary disputes was again held illegal because of findings that the unions involved had an objective of forcing persons not directly involved in the dispute to cease doing business with another.

NLRB v. International Rice Milling Company, 341 U.S. 665 (1951) is not in any way inconsistent with these cases, for it was decided upon the basis that the activities of the union at the site of its primary dispute did not encourage concerted but rather stimulated individual action on the part of the employees of an employer not directly involved in a dispute. See *NLRB v. Denver Building & Construction Trades Council*, 341 U.S. 675 at 687. Nor does the *International Rice Milling* case immunize the conversation between the longshoremen from Local 8 and Hapco's truck drivers as appellants contend (Br. 46), for the question remains one of fact to be determined by the jury as to whether the conversations were inducements or encouragements to concerted action on the part of Hapco's employees.

We accordingly submit that under the language of the statute, and the decision of the Supreme Court, the determination of whether a union has violated Section 303 (a) is a fact question of whether it has engaged in prohibited action for a proscribed object; and it was on this basis that the District Court submitted the case to the jury in this case (Tr. 1418-1435). *United Brick & Clay Workers v. Deena Artware Inc.*, 198 F. (2d) 637 (CA 6,

1952) cert. denied, 344 U.S. 897, rehearing denied, 344 U.S. 919 (1953). In that case an employer, engaged in a dispute with his employees, brought a suit for damages under Section 303 against a union which was picketing its plant and also an adjoining warehouse being constructed by a general contractor for the employer, which caused the employees of the general contractor to cease working. In affirming a judgment for damages for the employer, the Court of Appeals said (198 F. (2d) at 642):

"It is well established by now that the right to strike under the National Labor Relations Act, Section 163, Title 29 U.S. Code, includes peaceful picketing by the striking employees of the employer's place of business, regardless of the damage to the employer's business resulting therefrom. *N.L.R.B. v. Rice Milling Co.*, 341 U.S. 665, 671; *N.L.R.B. v. Service Trade Chauffeurs*, 191 Fed. (2d) 65, 67, C.A. 2nd. Such activity is generally referred to as 'primary' picketing. But the extension of such picketing for the purpose of exerting pressure on a neutral employer, generally referred to as 'secondary' picketing or boycott, was, under certain conditions, made unlawful by Section 303 (a) of the Labor-Management Relations Act of 1947. As pointed out in *N.L.R.B. v. Service Trade Chauffeurs*, supra, the difficulty lies in determining whether certain activity on the part of striking employees constitutes 'primary' or 'secondary' picketing. . . . If the picketing around the area of construction in the present case was by the Appellants and was for the purpose of forcing the general contractors to cease doing business with Deena, and accomplished that result, it was unlawful under Section 303 (a) (1) of the Act. If it was not by the Appellants or was not for that purpose, but was in substance merely a picketing of the place of business of the primary employer, it was not unlawful. We agree with the District Judge that the

evidence presented questions of fact for the jury. . . . In our opinion the evidence was sufficient to take the case to the jury on the issues of whether the picketing on the part of the Appellants was against Deena or against the general contractors and the purpose thereof. The charge of the District Judge properly presented these factual issues to the jury for its decision. The jury found for the Appellee."

D. The Instructions Concerning the Elements of Liability under Section 303 (a) were Proper (Answer to Appellants' Brief Argument 3E).

1. No Objections Taken to Instructions.

In their brief appellants assert for the first time that the instructions of the Court setting forth the various elements required to establish liability under Section 303 (a) (1) in terms of the evidence in the case, were erroneous in various respects (Br. 54-61). The contentions now asserted by appellants were not presented (with the exception noted below) to the District Court at the time the challenged instructions were given so that the Court might have had an opportunity to consider modifying its instructions.²¹

It is well settled that a party may not urge on an appeal an erroneous instruction unless he objected thereto at the time of trial and stated distinctly the grounds of his objection. Rule 51, Federal Rules of Civil Procedure; *Novick v. Gouldsberry*, 173 F. (2d) 496, 500 (CA 9, 1949); *Barron & Holtzoff*, Federal Practice and Procedure (Rules Ed., 1950), Vol. 2, Sections 1103 and 1104.

²¹Appellants objected to considering the Union Pacific Railroad as a "person" under Section 303 (a) (Tr. 1456).

Under the present circumstances, we urge that appellants' failure to point out to the District Court the specific objections which they now wish to raise bars their review in this Court.

2. *The Instructions Were Proper.*

In any event the instructions given were proper. They strictly applied the language of Section 303 (a) (1) and required Hapco in order to recover to prove by a preponderance of the evidence that either International or Local 8, or both, (a) induced and encouraged (b) the employees of any employer (c) to engage in a concerted refusal in the course of their employment (d) to use, transport or otherwise handle any goods or to perform any services in connection with Hapco's cargo; and (e) that one of the objects of the inducement or encouragement was to force an employer or person to cease doing business with any other person, and that (f) it was injured as a direct and proximate result.

With respect to requirement (b) that prohibited inducement and encouragement by the unions must be directed against the "employees of any employer" there were present at The Dalles the employees of various employers engaged in unloading the barge and transporting the cargo therefrom by rail and truck to California, namely, those of Hapco, the Goodat Crane Company, the Union Pacific Railroad, the Port of The Dalles, and various trucking companies. Instead of combining all of these classes of employees of employers (except those of the Union Pacific and the Port of The Dalles which the Court excluded (Tr. 1420)) and presenting them in one

instruction to the jury, as Hapco did in its pretrial contentions,²² the Court divided its instructions in this regard into two parts. In one part it considered the prohibited conduct of the unions against the employees of Hapco (Tr. 1424-1425), and in the other part against the employees of the trucking companies and Goodat (Tr. 1425-1426).

Appellants' first objection is that the first part of these instructions treats Hapco "as a secondary employer whose employees are induced to withhold their services in order to apply pressure upon the 'primary' employers", whereas appellants assert that they had no primary dispute with these latter employers (Br. 55).

Insofar as we can follow appellants' argument, it appears to be based upon a misinterpretation of the instruction and of the Act. The instruction does not treat the U.P., trucking companies, Goodat, etc., as primary employers but considers them as the "any other person" within the prohibited objective of Section 303 (a) (1) of "forcing or requiring . . . any employer or other person

²²In paragraph 6 of its contentions in the Pretrial Order, Hapco alleged, in part, that:

" . . . the defendants engaged in and induced and encouraged the employees of employers engaged in unloading said barge and employees of employers engaged in transporting freight by rail and by truck between the states of Oregon and California to engage in a concerted refusal in the course of their employment to refuse to transport, handle or work on or perform any services in connection with plaintiff's cargo, with an object of forcing and requiring plaintiff and Isleways, Ltd. to cease doing business with said employers and with persons in the State of California to whom said cargo was being shipped, and other states, and of forcing and requiring said employers and persons to cease using, handling, transporting or otherwise dealing with plaintiff's pineapple and to cease doing business with plaintiff and with Isleways, Ltd." . . . (Tr. 57-58).

. . . to cease doing business *with any other person*". In effect, appellants' argument is that the "any other person" referred to in the statute can only be the so-called primary employer with whom the union claims a dispute. Section 303 (a) (1) has no such limitation in its language or in its purpose; and appellants' argument once again illustrates the difficulty of using primary and secondary activities as tests of liability. When prohibited conduct is directed against an employer who is not involved in an actual dispute for a purpose of forcing or requiring him to cease doing business with anyone, both the language and the purpose of the Act have been violated.

Appellants' other objection to the first part of these instructions is that the evidence fails to establish that Hapco was forced to cease doing business with the Union Pacific Railroad, Goodat and the trucking companies (Br. 56-58). The statute only requires that one object or purpose of the proscribed union action be the forcing or requiring a person to cease doing business with another person. The statute does not require that this object or purpose be realized. The evidence introduced by Hapco was more than sufficient to have submitted to the jury the question of fact of whether one object of the activities of International and Local 8 was to force Hapco to cease dealing with the following:

Union Pacific Railroad²³ — Botley, who was Hapco's

²³Appellants also contend (Br. 56), but without any reasons given therefore, that the Union Pacific Railroad was not a "person" with whom Hapco could be forced to cease doing business under Section 303 (a) (1). In Section 501 (3) of the Act, a "person" is defined to

official in charge of transporting the pineapple cargo from Hawaii to the Pacific Coast (Tr. 1014), testified that subsequent to making arrangements with the Port of The Dalles to unload the barge (Tr. 1024) he personally ordered railroad cars from the Union Pacific Railroad (Tr. 1035-1036). However, after the commencement of the picketing at The Dalles on September 26, Meehan testified that he contacted the various railroad brotherhood unions at The Dalles and asked them to respect the long-shore picket line, and was told in reply that members of the railroad unions would not endanger any pickets on the track (Tr. 781-783). On September 28 at a time when there were 200 to 300 pickets before the entrance to the dock and other pickets at the switching facilities of the Union Pacific Railroad leading into the dock, the railroad cars which had been ordered came up to the pickets at the switching facilities, stopped, and then went back (Tr. 517-518, 892, 1037). All during the time that the Port of The Dalles was picketed in September and later in October, no railroad cars were brought into the Port terminal by the regular train crew, though several officials of the railroad later brought in and took out a number of railroad cars through the picket line (Tr. 1037-1038).

Goodat Crane Company — Hapco leased a crane and an operator from the Goodat Crane Service to lift pine-

have the same meaning as when used in the National Labor Relations Act, as amended. In Section 2 (1) of the latter Act the term "person" is defined to include "one or more individuals, labor organizations, partnerships, associations, corporations, legal representatives, trustees, trustees in bankruptcy, or receivers". The Union Pacific Railroad is within this definition. See *International Rice Milling Co. v. NLRB*, 183 F. (2d) 21, (CA 7, 1950), reversed on different grounds, 341 U.S. 665.

apple from the barge to the Port dock (Tr. 1040). When the leased crane was brought from Portland to The Dalles and was being assembled there by Goodat's two employees, a number of longshoremen came over from the entrance to the Port dock to tell Goodat's employees that they had better not take the crane out on the dock if they intended to unload some "hot pineapple" because it is "liable to melt the boom off and it won't be healthy for you" (Tr. 876, 879). When Goodat's employees, who were members of Local 701, Hoisting & Portable Engineers (Tr. 876), returned later to The Dalles they refused to go to work because of the longshore picket line (Tr. 882). Thereafter, when Goodat himself was threatened at his home by two men who identified themselves as "from the Hawaiian pineapple job" at The Dalles, he terminated the lease arrangement and Hapco was forced to buy the crane from him (Tr. 885-886, 1041).

Trucking companies — As well as talking to the various railroad unions, Meehan admitted that he contacted the Teamsters Union, members of which were employed as drivers by the various truck common carriers serving The Dalles, and received the assurance that the Teamsters would not order their men through the longshore picket line (Tr. 587, 780-782, 1009). Botley also testified that he ordered trucks from Consolidated Freightways, Portland-Pendleton Motor Freight Company, and Oregon-California-Nevada Fast Freight (Tr. 1034-1035). Consolidated Freightways supplied one truck which went onto the dock before the picket line was established (Tr. 1004). On September 28th when another Consolidated

Freightways truck came up to the picket line at the Port dock, the driver got out, went up to the picket line, and then turned around and left (Tr. 1036-1037). The Portland-Pendleton Motor Transport Company subsequent to the riot transported the pineapple from The Dalles to the Southern Pacific Railroad in Portland (Tr. 589-592).

Hapco's California customers — There was admitted in evidence orders placed with Hapco for 68,300 cases of pineapple from various fruit packers in California (Exhibit 188; Tr. 912). The pineapple on the barge was being shipped to these concerns in fulfillment of these orders (Tr. 1018-1019). As a result of appellants' activities, Hapco was prevented from making any deliveries on these orders (Tr. 916-918).

Appellants' next objection goes to the latter part of the Court's instructions, which vary from the first part in that for the required element of the "employee of any employer", the employees of Goodat and the trucking companies are substituted for Hapco's employees (Tr. 1425-1426). Appellants view this latter instruction as inconsistent with the former, in that it makes the trucking companies and Goodat secondary employers and Hapco the primary employer in reverse of their roles in the first part of the instruction. This is said to show that the District Court was having difficulty in determining who were primary and who were secondary employers (Br. 58-59). Again appellants have misconstrued the instructions and the Act. Under the evidence, Hapco, the trucking companies and Goodat were all employers who were not involved in any labor dispute with International

and Local 8 but whose employees were subjected to influence by the activities of appellant unions; and as such all were entitled to the protection of the Act.

Appellants' other objection to the latter portion of the instructions is that there is no evidence of a concerted refusal of the employees of Goodat. This is not in accord with the record reviewed above which shows that Goodat only had two employees and that both of them refused to perform any services in connection with the pineapple after being spoken to by a group of longshoremen and being faced with a picket line. In any event, the statute only requires that employees be induced or encouraged to engage in a concerted refusal, not that they must actually quit; and this is a question of fact to be determined by the jury, as it was in this case.

The *International Rice Milling Company* case, cited by appellants, does not stand for their claimed proposition (Br. 60) that no inducement or encouragement is shown by a person's refusal to cross a picket line.

Appellants' other assertion that there was no evidence of inducing or encouraging the employees of the trucking companies simply disregards Meehan's testimony concerning his contacting the Teamsters union to which the employees of these concerns belonged and the evidence or the effect of the longshore picket line upon these drivers.

E. Conclusion

Appellants' International and Local 8 had no legitimate labor dispute or connection with any of the persons at The Dalles concerned with the unloading of Hapco's

cargo of pineapple and transporting it on to California. Nonetheless, appellant unions proceeded by their various activities to expose all of these neutrals to union pressure and to subject them to economic loss — all for the immediate object of preventing the unloading of Hapco's pineapple and for the larger purpose of preventing any shipments whatsoever between Hawaii and the United States so as to generate public pressure in Hawaii and force the employers whom they were striking against to give in.

Section 303 of the Act was designed to provide redress for those sustaining damage to their property and business as a result of such unjustified wrongs and was properly applied by the District Court in presenting to the jury the issues to be determined by them.

IV.

The District Court Did Not Err in Instructing the Jury Concerning Hapco's Duty to Minimize Its Damages (Answer to Specification of Error 2).

Appellant unions objected to and have assigned as their Specification of Error 2 the following instructions which the District Court gave the jury on the duty of the appellee to minimize its damages:

"In this case, if you do award damages, you must remember that it is the duty of plaintiff to minimize the damages as far as reasonably possible. Therefore, if you find that plaintiff is entitled to recover damages but that it could have reasonably, in the exercise of due diligence and fair business practices, have minimized the amount thereof by taking any measures suggested in the evidence, you are entitled to consider that factor in assessing damages." (Tr. 1441-1442)

The specific ground of appellants' objection was that the Court failed to detail the evidence showing the particular ways in which the appellants contended Hapco could have minimized its damages.²⁴

The correctness of the District Court's instruction is not disputed,²⁵ but, instead, the specific objection is made that the Court should have amplified its instruction by singling out particular circumstances or evidence. Once it is acknowledged, however, that "the Judge has made an accurate and correct charge, the extent of its amplification must rest largely in his discretion". *United States v. Bayer*, 331 U.S. 532, 536 (1947); *Southern Pacific Co. v. Souza*, 179 F. (2d) 691, 695 (CA 9, 1950).

As shown below, there was no evidence in this case which would have warranted the District Court in exercising its discretion to amplify its charge in the particulars requested by appellants. For it to have done so, we

²⁴It should be noted that the District Court had previously instructed the jury with respect to appellants' contentions:

"Defendants contend plaintiff could have purchased ample pineapple from other sources without money loss and thereby minimized damages.

Defendants contend that plaintiff could have refrained and refused to buy large quantities of fresh fruit in 1949 under its contracts to purchase fresh fruit from growers thereof without money loss and thereby minimize their damages." (Tr. 1424) This was in accordance with appellants' contentions in the Pre-Trial Order (Tr. 65-66).

²⁵Section 303 of the Act contains no provision with respect to any obligation of a person injured in his business or property by a union's illegal activity to minimize his resulting damages. In view of the wilful and intentional tort involved, it may well be that no such obligation arises. See *Desimone v. Mutual Materials Co.*, 23 Wash. (2d) 876, 162 P. (2d) 808 (1945); *Smith v. International Printing, etc.*, 145 Tex. 399, 198 S.W. (2d) 728 (1946); *Runnells v. Village of Pentwater*, 109 Mich. 512, 67 N.W. 558 (1896).

submit, would have been error. *Southern Ry. v. Cunningham*, 123 Ga. 90, 50 S.E. 979 (1905); *Pelham & H. R. Co. v. Walker*, 27 Ga. App. 398, 108 S.E. 814 (1921).

In their brief appellants assert various ways in which they believe Hapco failed to minimize its damages. Throughout their argument, however, appellants lose sight of the nature of the doctrine of mitigating damages, which only requires one injured by the wrongful acts of another to exercise reasonable care to minimize the resulting damage. 15 Am. Jur. 420, 424, *Damages*, Sections 27 and 28.²⁶ It is fundamental that the doctrine does not arise until, and is only applicable after, the wrong has been committed. *St. Paul Fire and Marine Insurance Co. v. Bigger*, 105 Kans. 311, 182 P. 184 (1919); *Southwestern Gas and Elec. Co. v. Stanley*, 45 S.W. (2d) 671, *aff'd*. 123 Tex. 157, 70 S.W. (2d) 413 (1934); *City of Richmond v. Cheatwood*, 130 Va. 76, 107 S.E. 830 (1921). It is equally established that a party is not bound to anticipate that a wrong will be committed against it. *Rathborne, Hair & Ridgeway Co. v. Williams*, 59 F. Supp. 1, 4 (E.D. S.C. 1945); *Parkersburg Rig & Reel Co. v. Freed Oil & Gas Co.*, 111 Kans. 37, 205 P. 1020 (1922); *City of Garrett v. Winterich*, 44 Ind. App. 322, 87 N.E. 161 (1909); *Carter Oil Co. v. Jackson*, 194 Okl. 621, 153 P. (2d) 1013 (1944).

²⁶What is meant by the so-called duty to mitigate damages, said Chief Justice Cardozo, concurring in *McClelland v. Climax Hosiery Mills*, 252 N.W. 357, 169 N.E. 605 (1930) mod. 253 N.Y. 534, 171 N.E. 770, is merely that, if a plaintiff neglects to do what ordinary and reasonable prudence dictates to lessen the damages, he will not be heard to say that the loss properly chargeable to his own negligence is a jural consequence of the wrong. Such consequences are deemed not to flow directly and naturally from the wrongful act and are regarded as remote.

Appellants first suggest that Hapco failed to minimize its damages, because it bought fresh fruit in California through the summer of 1949 until September thereof for use with Hawaiian pineapple in making fruit cocktail, in the face of the strike of longshoremen in Hawaii and the resulting interruption of shipping from Hawaii (Br. 64-65).

The evidence shows that the purchases of fruit by Hapco at its San Jose, California, plant were made under written contracts which it had previously entered into with various fruit growers in California (Tr. 958-961). Although these contracts contained cancellation clauses which could be invoked "in the event of labor difficulties", a Hapco official from the San Jose plant testified that if Hapco had cancelled its fruit delivery purchase contracts with its suppliers, it would practically have wrecked its organization for future years' operations (Tr. 961). This witness also testified that as late as August 31, 1949, the San Jose plant was expecting delivery to it in California of the pineapple on the barge. This would have then been processed with the fresh fruit purchased under the contracts to make fruit cocktail (Tr. 964-965). The record thus makes apparent the reasonableness of Hapco's action in not cancelling its fruit contracts. But in any event, as a matter of law, Hapco was not bound to anticipate the wrongs which appellant unions were to inflict upon the pineapple barge and it had no duty to minimize until after the infliction of the damages.

Appellants next suggest that Hapco was unreasonable in failing to purchase non-Hawaiian grown pineapple

for use in producing fruit cocktail, or that failing this, Hapco could have canned the various fruits separately or as fruit mix and sold them under different labels.

Here again, appellants are asserting that Hapco should have anticipated the appellants' subsequent illegal activities against it, even though the evidence shows the reasonableness of what Hapco did prior to the commission of appellants' wrongs. Hawaiian pineapple is a uniquely high-grade product for which equal substitutes were not available in the summer of 1949. It was not possible to substitute Mexican, Cuban or Puerto Rican pineapple for Hawaiian pineapple because the fruit grown in the former countries was of far lower quality than Hapco's standards (Tr. 982-984). Having for many years spent thousands of dollars advertising its product, Hapco could not be expected to sacrifice the goodwill of its customers throughout the nation by using inferior fruit in its products. As for putting up "fruit mix" or separately canning different kinds of fresh fruit, Hapco's evidence was that the product known as "fruit mix" was unsalable in any quantity (Tr. 988-989), and that the San Jose plant was primarily a fruit cocktail plant and was not equipped with the facilities and techniques for separately canning fruits, such as peaches and pears (Tr. 976, 977-978). In fact the testimony was that the San Jose plant could have packed only a very small volume of the various fruits separately (Tr. 978).

In their final point appellants depart from the ground assigned by them in objecting to instructions of the Court as to minimizing damages. Instead they say that the

damages recovered by Hapco were in excess of what the evidence showed it was entitled to. Appellants' contention is that 25% of Hapco's reprocessing costs were incurred from September 26 to 29, inclusive, which costs cannot be charged to appellants because the barge did not arrive in The Dalles until September 26 and therefore Hapco's reprocessing costs incurred on September 26, 27, 28 and 29 are not proper items of damage (Br. 66).

Appellants' point is not well taken. The pineapple barge arrived in The Dalles on September 24 (Tr. 1025, 1033) and not on September 26 as appellants say (Br. 66). Arrangements had been made to commence unloading it September 26 (Tr. 1041). Hapco's San Jose plant, which had been processing fresh fruit into fruit mix for approximately three weeks prior to September 26th to prevent its spoilage, expected to receive some of the pineapple by September 27 or 28 and had planned to hold up the further processing of fresh fruit into fruit mix from September 26 until the pineapple arrived (Tr. 936-938). Had the pineapple arrived as planned, the processing of the remaining fresh fruit on hand into fruit mix would not have been necessary. However, when the San Jose plant learned on September 26 and 27 of the difficulties of unloading the barge at The Dalles, it decided that it would have to go ahead and process the rest of the fresh fruit to keep it from spoiling; and from September 26 until October 6, it packed 138,388½ cases of fruit mix (Tr. 937-938). Inasmuch as there was no market for fruit mix (Tr. 938, 988-989, 995-996), Hapco was required to reprocess all of the fruit mix into fruit cock-

tail after the eventual receipt of the pineapple from the barge in November (Tr. 939, 941).

Hapco made no claim for the expenses it incurred in processing the fresh fruit into fruit mix prior to September 26. However, the expenses, which it incurred in reprocessing the fruit mix subsequent to that date upon which testimony was received (Tr. 938-939, 956-958, 990-991), were claimed by Hapco to be a damage to its business and property directly and proximately resulting from the unlawful activities of the appellant unions.

It was the burden of the appellant unions to prove that Hapco failed to reasonably mitigate its damages. 15 Am. Jur. 770, Damages, Sec. 331; Annotation, 134 A.L.R. 242, 279 ff; *Standard Growers Exchange v. Hooks*, 22 F. (2d) 599 (CA 5, 1927); *Lerman v. Fruit Processers, Inc.*, 191 F. (2d) 349 (CA D.C. 1951), cert. denied 342 U.S. 877 (1951).

The evidence indicates that they failed to sustain this burden. In the last analysis, the question was one of fact for the jury to determine. 15 Am. Jur. 802, Damages, Sec. 363. The issue was presented to them on a correct statement of the law. The jury's verdict bespeaks their findings on this issue. This appellate Court is not the forum to relitigate this issue of fact.

The Trial Court, in commenting upon the appellants' contention that the verdict was too high because the jury gave no consideration to the minimization of damages,²⁷ said:

²⁷In the Pretrial Order, Hapco contended that it was entitled to damages of \$234,280.29 (Tr. 61). The verdict in favor of Hapco was for the sum of \$201,274.27 (Tr. 136).

"But the Court would have upheld a verdict in a much greater sum within the limits of the prayer of the complaint, if it had not been for an express disclaimer by Pineapple during the trial. The jury returned a lesser sum probably because they believed Pineapple would be satisfied to accept that amount. In view of the actions for which the unions were found liable, the jury unquestionably felt that Pineapple was not required to accept damages scaled down for the benefit of the unions, the aggressors. The Court agrees." (Tr. 166-167)

We submit that the Trial Court was correct in its estimate of appellants' argument.

CONCLUSION

A review of the record in this case shows that the verdict of the jury was supported by clear and convincing evidence that the appellant unions violated Section 303 (a) (1) of the Act and thereby damaged Hapco. No errors affecting the rights of appellant unions were made by the District Court. The judgment should therefore be affirmed.

Respectfully submitted,

KRAUSE & EVANS
GUNTHER F. KRAUSE
DENNIS LINDSAY
GERALD H. ROBINSON
Attorneys for Appellee
Hawaiian Pineapple Company, Ltd.

United States Court of Appeals
For the Ninth Circuit

INTERNATIONAL LONGSHOREMEN'S &
WAREHOUSEMEN'S UNION (CIO), and
INTERNATIONAL LONGSHOREMEN'S &
WAREHOUSEMEN'S UNION, LOCAL 8,
Appellants,

vs.

HAWAIIAN PINEAPPLE COMPANY, LTD.,
a corporation,
Appellee.

HAWAIIAN PINEAPPLE COMPANY, LTD.,
a corporation,
Appellant,

vs.

MARTIN E. ADEN, et al.,
Appellees.

Appeals from the United States District Court
for the District of Oregon.

APPELLANTS' REPLY BRIEF.

GLADSTEIN, ANDERSEN & LEONARD,
NORMAN LEONARD,

240 Montgomery Street, San Francisco 4, California,

*Attorneys for Appellants, International
Longshoremen's & Warehousemen's
Union (CIO), and International
Longshoremen's & Warehousemen's
Union, Local 8.*

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IN THE

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APPELLANTS' REPLY BRIEF.

In this reply brief we shall not reiterate in any detail the argument for appellants. We shall endeavor only to restate it as simply as possible, with a view to correcting misconceptions found in the brief for appellee.

I.

THE PEREMPTORY AGENCY INSTRUCTION REQUIRES
A REVERSAL OF THE JUDGMENT.

In its simplest terms our argument is this: Appellant unions, being associations, cannot act directly as can individuals. Liability can be imposed upon them or either of them only *vicariously*. In order for vicarious liability to be imposed, there must co-exist at least two factors: (a) conduct by *an agent or agents* which (b) is within the course and scope of agency. In the absence of either of these two elements, there can be no vicarious liability. The first element is primary, for absent *the fact of agency*, there is neither the occasion nor the possibility of inquiring into the question of course and scope of the agency. Both questions were sharply contested in the Court below. *The first as well as the second* was posed by the pleadings, and the pretrial order specifically formulated as one of the issues in the case:

“(12) Was either Local 8 or any of the individual defendants named the authorized representative *or agent* of the International.” (TR 67.)

The failure to submit *this* issue to the jury constitutes reversible error.

The fact, which appellee dwells upon at great length (Brief of Appellee [hereinafter cited Br.], pp. 15-16, 21-26), that the trial Court submitted the second question—i.e., the “course and scope” question—to the jury, is no answer to our argument that the first question, too, should have gone to the jury and that the failure to submit it deprived appellants

of “*their unquestioned right* to have a jury trial on all contested issues of fact”, as appellee so aptly puts it. (Br. p. 22.)

That the existence of an agency relationship is a question of fact particularly appropriate for jury determination in civil¹ as well as criminal cases has been determined by the authorities already cited (Appellant’s Opening Brief [hereinafter cited AOB], p. 24), none of which appellee has ever considered.²

While appellee’s argument that Meehan, Gettings, Bodine and Schmidt were “undisputably” agents of the union (Br. pp. 16-21) might (or might not) have been a persuasive jury argument, it has no place here. The question here is, did the trial Court commit error in depriving appellants “of their unquestioned right” to a jury trial on the “contested issue of fact” which this clearly was.

In *Gunning v. Cooley*, 281 U.S. 90, at 94 (1930), the Supreme Court said:

“Issues that depend upon the credibility of witnesses, and the effect or weight of evidence, are to be decided by the jury. And in determining the motion of either party for a peremptory instruction, the court assumes that the evidence for the opposing party proves all that it reasonably may be found sufficient to establish, and that from such facts there should be drawn in favor

¹Appellee’s attempted distinction of *United Brotherhood, etc. v. United States*, 330 U.S. 395 (Br. p. 21), is therefore irrelevant, even if valid.

²Other (but older) cases holding the same way are: *Quinlan v. Holbrook*, 162 F. 272 (1908); *Sloat-Darragh v. General Coal Co.*, 276 F. 502 (1921); *Denton v. Brocksmith*, 299 F. 559 (1924).

of the latter all the inferences that fairly are deducible from them * * * Where uncertainty * * * arises from a conflict in the testimony or cause, the facts being undisputed, fair-minded men will honestly draw different conclusions from them, the question is not one of law but of fact to be settled by the jury.”

This case was relied upon in this circuit in *Pacific Can Co. v. Hewes*, 95 F. 2d 42 (1938), this Court squarely holding that the existence of an agency relationship is a question of fact properly to be submitted to the jury.

In the case at bar the issue depended in part upon the credibility of witnesses (Goldblatt, Meehan and Gettings, at least) and in part upon the weight or effect to be given to their testimony.³ Thus, under the rule of the *Gunning* case, the Court below erred in giving the peremptory instruction herein assailed.

Appellee’s references to *ILWU v. Juneau Spruce Corp.*, 189 F. 2d 177 (1951), and *United Electrical etc. v. Oliver Corp.*, 205 F. 2d 376 (1953) (Br. pp. 24-26), are not in point.

In the *Juneau Spruce* case the only specification of error directed to the instruction quoted on page 24 of appellee’s brief and relating to Vern Albright, “raised the issue of whether the trial Court [the District Court for the Territory of Alaska] was a

³In Appendix I are collected a few examples of the testimony which if believed (credibility) or if given the weight or effect urged by appellants (also a jury function) would indicate the absence of an agency relationship or demonstrate that the only relationship was with the Local and not with the International.

district court of the United States” and whether therefore the rules of agency described in Section 301 of the Taft-Hartley Law or the common law rules of agency governed (*ILWU v. Juneau Spruce* [9 Cir., No. 12527], AOB p. 18). There was no specification of error there which, as here, directly charged that an instruction specifying named individuals as agents of the union deprived it of the right to have “contested issues of fact” submitted to the jury. The *Juneau Spruce* case therefore is no authority for the point involved here.

In the *Oliver Corporation* case the question of the existence of Hobbie’s agency as distinguished from the question of its course and scope was apparently undisputed. For there the evidence showed that the very contract, the alleged breach of which was the basis for the suit, was signed by the International “by Charles W. Hobbie” (205 F. 2d 376, at 381). And the Court referred to Hobbie as the person “who had signed the contract as representative of the International union” (*id.*, 386). Obviously no question of fact respecting the existence of Hobbie’s agency (as distinguished from its course and scope) could exist upon such a record, and appellants there took no exception to the Court’s charge that Hobbie was in fact an agent of the International union.⁴ Thus, the *Oliver* case raised no issue comparable to the one here presented and can be no authority for any proposition involved in this case.

⁴Appellants’ brief therein (*United Electrical, etc. v. Oliver Corp.* [8 Cir., No. 14661]), which we have examined, reveals this to be the fact.

The question of agency was a contested issue and there was some evidence from which the jury could have found that at least one or more of the persons whom they were peremptorily instructed were agents were in fact not agents. The peremptory instruction therefore deprived appellants of the jury trial to which they were entitled and the judgment must be reversed with directions to grant a new trial.

II.

THE INCONSISTENCY OF THE VERDICT REQUIRES A REVERSAL OF THE JUDGMENT.

Appellants' contention is that the verdict (TR 136) and the judgment entered on it (TR 137-139) in favor of the 110 individual defendants requires a reversal of the judgment entered against appellants. (TR 140-141.) For it is claimed that these individuals acted on behalf of appellants and if the individuals committed no actionable conduct against appellee, then, as a matter of law, neither could appellants (the unions) have done so.

To say that "logical consistency in verdicts is not required" (Br. p. 26) is to beg the issue. The question is whether these judgments can stand together, not because in some formal sense they are illogical (as they are), but because the finding of nonliability as to the individual defendants necessitates as a matter of law the reversal of a contrary finding as to the unions.

Here the case was tried upon the theory expressed in open Court by counsel for appellee "that the Pineapple Company's damages * * * occurred within twenty minutes of one day", and that the facts respecting the injury to the Pineapple Company "are absolutely identical" with the facts respecting the claimed injury to the two employees of the Pineapple Company. (TR 228.)⁵ That being so, the exoneration of the persons involved in that episode requires the exoneration of their alleged principals.⁶

The cases cited by appellee (Br. pp. 26-28) do not require a contrary conclusion. They involve either no conflict in the verdicts (as in *Jayne v. Mason-Dixon Line*, 124 F. 2d 317 [1941] wherein it was held that a wife riding with her husband driver could recover damages against a third party despite a verdict against the husband, because under the local law the contributory negligence which precluded his recovery was not imputed to her); or legally unrelated and separate issues (as in *Dunn v. United States*, 284 U.S. 390 [1932], wherein a criminal indictment contained several counts and the Court adverted to the long established rule that each count stood on its own feet, so to speak, and pointed out that separate indictments could in fact have been returned); or the absence of a square finding in favor of the servant (as in *Southeast Greyhound Lines v. McCafferty*, 169 F.

⁵See AOB pp. 3, 4, n. 2. The injury to these two employees obviously occurred during the twenty minute eruption of violence on September 28, 1949.

⁶In addition to the authorities already cited (AOB pp. 29-30), see *Weekley v. Pennsylvania R. Co.*, 104 F.Supp. 899 (1952).

2d 1 [1948], wherein a *mistrial* as to the servant was held not to be a *finding* as to his non-liability).

Here there were no such situations: the verdict and judgment in favor of the individual defendants was unequivocal; the causes of action set up against all defendants (both individual and union) were identical and the union's liability was, as it obviously had to be, predicated upon the doctrine of *respondeat superior*; and there was no special defense open to the individuals not open to the unions which would justify the results reached.

On the last point the argument is made that the liability of the unions and the individuals rested "upon different findings of fact". (Br. p. 29.) But the record on this point underlines our view that on the facts here the judgments cannot stand together. For the only distinction made in the instructions was that as to the individuals there must also be a "conspiracy" finding before a verdict could be returned against them. (TR 1436-1437.) Thus in exonerating the individuals the jury must have found that the individuals did not conspire as charged. But if the individuals did not conspire neither did the unions, for the unions could only conspire through and by means of the individuals as indeed was charged by the Court below. (TR 1434.) Since the jury exonerated every alleged individual conspirator, there is no basis upon which it can now be urged that the associations "conspired" *in vacuo*, so to speak, to commit the tort.

The suggestion that liability can be imposed upon the unions because of the alleged conduct of non-defendant individuals is of no help to appellee. The "100 other longshoremen" (Br. p. 27) referred to as participating in the picketing and rioting were nowhere identified in the record and liability can hardly be imposed upon these appellants for what unknown and unidentified persons may have done. Nor is there a showing that the Hawaiian picket was an agent or employee of either of these two appellants, and the suggestion that liability may have been predicated upon his conduct is not consistent with the instruction given on the subject. (TR 1431.) If, in fact, liability was predicated upon the Hawaiian picket's activities, the verdict and judgment against the unions has to be reversed and set aside as being unsupported by substantial evidence.⁷

Nor for the reasons heretofore stated⁸ can liability be imposed on these appellants for the alleged conduct of the nondefendants Gettings, Schmidt, Bodine and Goldblatt. Certainly a verdict and judgment predicated, for example, on the alleged activities of Goldblatt or Bodine, has to be reversed because of lack of substantial supporting evidence.

In sum, appellee engages in a series of ingenious arguments to obscure (1) the fact that there was

⁷Incidentally, our Specification of Error No. 5 (AOB p. 17) is broad enough to embrace this and other points we make despite appellee's apparent misconception that those points are not properly before this Court (Br. p. 66).

⁸Supra, pages 3-5.

submitted to the jury the issue of whether named individual defendants had committed the tort against appellee and if so, whether appellant unions were responsible under the doctrine of *respondeat superior*, and (2) the fact that the finding exonerating the individual defendants requires as a matter of law the reversal of the judgment against these appellants.

III.

THE ERRONEOUS INSTRUCTIONS ON THE TAFT-HARTLEY LAW VIOLATION REQUIRE A REVERSAL OF THE JUDGMENT.

There seems to be no quarrel with appellants' assertion (AOB pp. 36-39) that in order for there to be a cause of action under Section 303(a) of the statute, there must be present at least a primary employer, a trade union, and a secondary employer. It is the economic relationship between these three and the application of economic pressures at specific points in that relationship that determine whether or not the statute has been violated. Only if, in a dispute with Employer I, the union puts pressure on Employer II for the prohibited objective does the statute come into play. Thus the rationale of the statute is to prevent direct economic injury to an employer totally disinterested in the conflict.

As appellants have heretofore pointed out (AOB pp. 37-38), even admittedly simple, direct, primary activity has secondary effects and if the statute is read literally it outlaws even primary, peaceful pick-

eting. In order to avoid this result, which is at variance with both the legislative intent (AOB p. 39) and the Constitution (cf. *Thornhill v. Alabama*, 310 U.S. 88 [1940], and *Carlson v. California*, 310 U.S. 106 [1940]), the Courts have required clear proof of secondary activity and have refused to find violations of the statute where there was only primary activity (cf. *NLRB v. International Rice Milling Co.*, 341 U.S. 665; *Douds v. Sheet Metal Workers Union*, 101 F. Supp. 273), or where the two employers were so closely connected economically as to render inapplicable the rationale of the statute (*Douds v. Metropolitan Federation etc.*, 75 F. Supp. 672).

Here appellants established that there was primary, not secondary, activity at The Dalles and that such activity was legitimately directed at the employers of longshore labor there (either the Port of The Dalles or appellee). (AOB pp. 43-45.)⁹

⁹Appellee's suggestion (Br. p. 34) that appellants have made a novel assertion without record citations to support this claim can only mean that appellee has overlooked the transcript references cited at AOB p. 45. The record referred to reads:

"Q. All right. Now, what did you ask the Port of The Dalles to do? Did you ask them to hire Portland longshoremen up there, 92 miles away from there, or did you say that you wanted to represent their employees? Which was it?

A. We wanted to work according to the longshore agreement. Now, if they had recognized and agreed to work according to the longshore agreement, then we could have sat down and worked out these other matters, Mr. Krause, such as how we was going to hire people, and so forth. But the people absolutely refused to have anything to do with us in the way of reaching an agreement of any kind.

Q. You wanted to have a contract with the Port of The Dalles between the Port of The Dalles and Local 8; is that right?

A. And the Pineapple people who were doing the work.

Q. Do you have contracts with the people that do long-

Here, also, appellants sought to establish, but were prevented by rulings below from establishing, that the economic relationship between appellee and the Hawaiian stevedoring companies was so close as to render the statute inapplicable to the case at bar. (AOB pp. 50-54.)¹⁰ The failure to submit appellants' theory of the case on these points to the jury is such error as to warrant a new trial.

The instructions submitted on the applicable law were also erroneous. If the primary employers were the Hawaiian stevedoring companies and appellee was the secondary employer, then there was no occasion for instructions respecting the activities of appellants vis-a-vis the crane company, the trucking companies, etc. Clearly such instructions could have given the jury no conception as to which if any of the multitude of employers here involved were pri-

shore work, or do you have contracts with the people that run the ships?

A. *We have both*, I would say.

Q. Well, you have contracts with the people that run the ships when they also have their own stevedores. Otherwise your contract runs to the stevedores, doesn't it?

A. Well, in some instances on that one, Mr. Krause, *there are some steamship lines who in some ports on the Pacific Coast do their own stevedore work*. In other ports it is sublet to contractors. And the master agreements—*the people that own the ships are parties to the agreement* as well as the people who do the work, the contracting stevedores. *They are both parties to the agreement. * * ** (TR 1285-1286.)

¹⁰“Through a complex system of interlocking directorates the Big Five is able to exert sufficient influence to control most of the Territory's economy. Their *sphere of domination* extends not only to the two basic island industries, sugar and *pineapple*, but encompasses such diverse fields as shipping, banks, and trust companies, wholesale and retail food and mercantile stores, press and radio, lumber and building materials, public utilities and tourist trade, among others.” Comment: *Alaska and Hawaii: From Territoriality to Statehood*, 38 Calif. L.R. 273, 274, n. 2 (1950).

mary and which secondary; and the jury could not have had a conception from the instructions given of the standards required to justify imposition of liability on appellants.

Furthermore, the key instructions (TR 1424-1426) gave the jury two utterly inconsistent approaches to the problem. On the one hand, the jury was charged in effect that the crane company, the trucking companies, and others, were primary employers, and appellee secondary; and a moment later it was charged in effect that appellee was the primary employer and the other named employers were the secondary ones. Such an equivocal direction to the jury on a basic issue requires a reversal of the judgment. (*Bollenbach v. United States*, 326 U.S. 607 [1946].)

Appellee's suggestion that the contentions pressed by appellants (AOB pp. 54-61) were not presented below (Br. p. 54) ignores the record. Specific objections were made to the trial Court so that it had ample opportunity to correct its error.¹¹

Certainly the instruction that the Union Pacific Railroad Company was a person within the meaning of Section 303(a) was clear error. The National Labor Relations Board has just recently refused to follow the Seventh Circuit's decision in *International Rice Milling Co. v. NLRB*, 183 F. 2d 21 (1950), reversed 341 U.S. 665 [1951] (Br. pp. 57-58, n. 23), and has reaffirmed its earlier conclusions (*International Brotherhood of Teamsters*, 84 NLRB 360; *In-*

¹¹Quoted in Appendix II are excerpts from the transcript wherein the points mentioned were specifically raised.

ternational Brotherhood of Electrical Workers, 87 NLRB 99, and *International Brotherhood of Electrical Workers*, 89 NLRB 221) that the statute is not applicable to either governmental agencies or railroad corporations (*International Brotherhood of Electrical Workers*, 104 NLRB No. 147, CCH Labor Law Repts., §12501, May 27, 1953). The Board's reasoning (*International Brotherhood of Electrical Workers*, 89 NLRB 221, 222-225) is obviously sound (cf. *United States v. United Mine Workers of America*, 330 U.S. 258) and should not be departed from here.

In any event, as appellants have already pointed out (AOB pp. 56-57, 60-61), business between appellee and the various employers named was not interfered with by reason of any activity of appellants, but because those employers for business reasons of their own did not desire either to commence or to continue such relationships.¹²

The suggestion that a violation of the Act may be found because of appellee's inability to deliver to its California customers (Br. p. 60) is not only novel in the sense that it was not urged below but is startling in its implication. Any union activity (simple, direct, peaceful picketing) may well result in inabil-

¹²The railroad and trucking companies had insufficient equipment and did not wish to engage in a one-way haul (Union Pacific [TR 1034-1035]; Consolidated Freightways [TR 1007, 1034-1035, 1163]; Nevada Fast Freight Trucking Co. [TR 1034-1035, 1163]; Portland Pendleton Fast Freight [TR 586-587]). With respect to the crane company, the evidence shows that there could have been no cessation of business since none could have taken place after September 27, 1949, the day before the riot, by virtue of the purchase of the crane by appellee on that day. Furthermore, the crane company's employee refused to cross the picket line at The Dalles because of a rule of *his* union, (TR 882.)

ity on the part of an employer to make deliveries. To our knowledge it has never before been suggested that that fact alone will transform such protected activity into a secondary boycott violative of the statute. The fact that appellee makes such a suggestion demonstrates the validity of the carefully documented argument we made (AOB pp. 36-43) in support of the contention that it is very important in a case like this to determine who was the primary employer and who was the secondary employer and to instruct the jury correctly on these issues. The failure of the Court below to make explicit the appropriate distinctions in the instructions given to the jury was erroneous and requires a reversal of the judgment.

IV.

THE FAILURE TO MINIMIZE DAMAGES REQUIRES A REVERSAL OF THE JUDGMENT.

Appellee's view that our only objection on this score is to the inadequacy of the Court's instruction (Br. pp. 62-63) is not well taken. Although we are of the view that the instruction was inadequate (TR 1457; AOB pp. 13-14), we have also urged that the verdict is contrary to the law and the clear weight of the evidence and that it is excessive (Specifications of Error Nos. 5 and 6, AOB p. 17).

Apparently appellee does not quarrel with the cases we have cited (AOB p. 63) which demonstrate that appellee had the duty to take steps to minimize its damages. Nor apparently does it quarrel with our

argument that it obviously did *nothing*—not one thing—to achieve that result. Instead it suggests (Br. pp. 65-66) that its failure even to try to hold down its damages was not unreasonable. But the record will not bear this out.

We have already quoted (AOB p. 64) the unqualified admission of one of appellee's own officers that appellee could have cancelled contracts representing \$142,000¹³ worth of fruit in ample time but it simply "didn't choose to do it." (TR 968.) For a business man to gamble \$142,000 on the outcome of a lawsuit is, we submit, neither reasonable nor prudent.

Secondly, the record shows that non-Hawaiian pineapple was available and not used. The argument that such fruit is so inferior that appellee "could not be expected to sacrifice the good will of its customers throughout the nation" (Br. p. 66) by using it, is hardly consistent with the testimony of its own "factory manager in charge of production" (TR 1288) that other nationally known concerns have and use non-Hawaiian pineapple.¹⁴

Thirdly, alternative and less wasteful uses for the fruit on hand were available but ignored. The suggestions that the San Jose plant had neither the techniques nor the facilities for canning fruits separately or as fruit mix or that such items were not saleable (Br. p. 66) are directly contrary to the testimony of responsible officials of appellee.

¹³It will be remembered that the total verdict was for slightly over \$200,000.

¹⁴"Calpak has the Philippine source; Libby McNeil has a Mexican source." (TR 1290.)

“Q. Mr. Woodworth, you are Vice-President in charge of marketing and sales of the Hawaiian Pineapple Company?

A. That is correct.

* * *

Q. Now, Barron-Gray, as you have indicated, they just process pineapple or fruit?

A. *Fruits.*

* * * * *

Q. Then if you process, in the years that you have processed pears, you have canned them and sold them; is that right?

A. Yes.

Q. And in the years that you have processed apricots you have canned them and sold them?

A. Yes. We tried hard to sell them.

Q. In the years you have canned peaches you have sold them, and in the years you have canned apricots you have sold them, or pears, or maybe cherries, or whatever it is they put up in cans, you always sell them; isn't that correct?

A. It is the responsibility of our division to sell them.

Q. And you do sell them, don't you?

A. *We sell them; that is right. If we don't sell them that year, we will the next.*

Q. In other words, *what you process down there you sell*; that is true, isn't it?

A. *Surely.*” (TR 1154-1155.)

“Q. Now, would I be correct in stating that the John Smith Company, which deals in fresh fruits, and wants a thousand cases of peaches or pears, or anything that you pack, they go to you and they say, ‘I want to buy a thousand cases of

peaches and I want you to put my label on them,' then you pack them and you put them in cartons with his name on them and you ship them to him; is that right?¹⁵

A. That is right.

Q. Does it apply to Fruit Cocktail?

A. To some extent.

Q. To a minor extent; is that right?

A. No, *I wouldn't say minor.*

Q. Oh. Well then, whether it is minor or major, does it apply to Fruit Salad, also?

A. I believe it does.

Q. Peaches?

A. I believe it does.

Q. Pears?

A. Yes.

Q. Prunes?

A. Yes.

* * * * *

Q. So you pack apricots, too?

A. We do.

Q. Now, in what sized cans are peaches, pears and apricots usually packed?

A. All the different sizes of cans.

* * * * *

Q. Then, as I understand it, when I go into a grocery store to buy some peaches, pears, or all of this stuff, it might be under the name of S & W or it might be under the name of Del Monte, or it might be under a hundred different names, but it could have come out of your plant; is that right?

A. That is right." (TR 970-971.)

¹⁵The witness was the assistant treasurer of appellee. (TR 934.)

Clearly this evidence, coming as it does from appellee's own responsible officers, demonstrates that the damages not only could have been mitigated but that it was utterly unreasonable for appellee to choose not to do so but blithely to go ahead and let them mount up.

“[Appellee's] conduct in dealing with these shipments and making claims for loss * * * was obviously strategic, and stemmed from the defendant's refusal to accede to [its] demand that [the pineapple be unloaded under non-union conditions at The Dalles] as well as from [its] interest in enhancing [its] alleged damages for the purposes of this law suit.” (*American Can Co. v. Russellville Canning Co.*, 191 Fed. 2d 38, 55 [1951].)

While we were in error in stating that the barge arrived at The Dalles on September 26 (AOB, p. 66), the error is of no consequence to the point made. The barge having arrived at The Dalles “on the evening of September 24, *Saturday*, at about 8:30 or 9 o'clock” (TR 1025), it could not reasonably be expected that unloading operations would commence that moment. Actually, no unloading operations were set up for Saturday or Sunday and no unloading operations were possible for the next several days, not because of any activity of appellants but because of the impossibility of appellee's obtaining transportation for reasons quite unconnected with those here involved.

“Mr. Krause. Q. What did you do regarding obtaining someone to transport the cargo; that is, before the barge arrived at The Dalles?

A. We contacted the large trucking companies and the railroads.

* * * * *

Mr. Krause. Q. After the barge arrived at The Dalles, what was their attitude toward handling the cargo?

* * * * *

The Witness. They stated that they had insufficient equipment available, and they objected on the ground that it was a one-way haul, among other reasons." (TR 1034.)

Appellee's own trucks did not arrive in California until midday on the 28th (TR 1038). Thus even without any interference by appellants, the cargo could not have arrived at the San Jose plant much before the first of October.

And yet, as we have pointed out, of the approximately 138,000 cases of fruit mix packed and processed (and it is this item which makes up the overwhelming bulk of appellee's claimed damages), over half of them were packed before October 1st.¹⁶

Clearly, therefore, the award of the maximum damages prayed for, representing as it does a failure to take into consideration the duty of appellee to minimize damages, and a further failure to eliminate from the computation that portion of the loss which was not and could not have been the proximate result

¹⁶On September 27, 14,064 cases were packed (TR 996); on the 28th, 16,511; on the 29th, 17,460½; on the 30th, 16,718; and on the first of October, 17,000. (TR 957.) This makes a grand total of over 80,000 cases on these four or five days when in all likelihood there would have been no pineapple at the plant irrespective of any conduct on the part of appellants.

of appellants' conduct, cannot stand and the judgment must either be reversed or this Court must by its remittitur reduce the amount of damages.

The trial Court's observation that "the jury unquestionably felt that Pineapple was not required to accept damages scaled down for the benefit of the unions, the aggressors" (TR 167), implicitly recognizes that the jury's assessment of damages was based not upon the evidence and the instructions, but upon bias and prejudice. For whether the jury (or the Court below) regarded the unions as "aggressors" is irrelevant to the issue and does not change the applicable rules of law. Every tort-feasor or contract breacher is an "aggressor" in the legal sense. Yet this does not deprive a litigant of the protection of rules of law which require that an injured party take reasonable steps to minimize its damages and which further provide that the only damages recoverable are those *directly* resulting from the unlawful conduct. To brand appellants as "aggressors" is no answer to the legal questions posed by the record here.

CONCLUSION.

For the foregoing reasons, and each one of them, the judgment below against these appellants must be reversed.

Dated, San Francisco, California,
November 25, 1953.

Respectfully submitted,

GLADSTEIN, ANDERSEN & LEONARD,

By NORMAN LEONARD,

*Attorneys for Appellants, International
Longshoremen's & Warehousemen's
Union (CIO), and International
Longshoremen's & Warehousemen's
Union, Local 8.*

(Appendices I and II Follow.)

Appendices.

Appendix I

Re MEEHAN:

“It should be clear, however, in order to avoid any confusion in your area, that you are not empowered to direct or apply a policy on your own, but can do so only when specifically instructed by the International officers, and only at such times are you empowered to act in behalf of the International union.” (TR 1217.)

“A. * * * But I wasn't an officer. Only elected officials are officers in our union. I couldn't commit the International to anything.

Q. You what?

A. I couldn't commit the International to anything.

Q. To anything?

A. That is right. I was restricted to whatever was required by the locals concerned.

Q. Then when you go into a local situation, and when you are so representing them, do you represent the local, or do you represent the International?

A. I represent the local.

Q. You say you are without authority to commit the International to anything?

A. I have no authority to commit the International, no.” (TR 1337.)

“Q. All right. By the way, Mr. Meehan, who had instructed you to contact these other union officials?

* * * * *

Q. I said union officials, you understood; not Port officials.

A. Oh, Bob Baker [President of Local 8] asked me to——

Q. Oh, Bob Baker told you to contact the union officials?

A. Any unions that I could contact.” (TR 1371-1372.)

Re SCHMIDT:

“Q. Isn’t that the Mr. Schmidt who is also one of the officers of the ILWU?

A. No. He is no officer of the ILWU.

* * * * *

Q. You say that he is not an officer of the International?

A. He was never an officer of the International Union. He was president of Local 10.

Q. He was president of Local 10?

A. Yes, sir.” (TR 704.)

Re BODINE:

“Q. To San Francisco, to Mr. Bodine or to Mr. Thomas?

A. Yes.

Q. Those are both officials of the ILWU, are they not?

A. No. They are what are known as coast committeemen. They are officials of the Longshoremen Di-

vision. They are not officials of the International. They are elected by the longshoremen to represent them in negotiations and in the implementation of the longshore contract.” (TR 717.)

With respect to Bodine, this is the only evidence in the record and therefore any finding that Bodine was engaged in the course and scope of his “agency” was clearly contrary to the weight of the evidence. Specification of Error No. 5 (AOB p. 19) is sufficiently broad to cover this point.

Appendix II

“With respect to our Proposed Instructions Nos. 40 and 41—and this also goes to certain instructions that your Honor gave—your Honor failed to give 40 and 41 and gave some others which were contrary, and we take exception to the failure to give 40 and 41 and to the ones that your Honor gave to the contrary on the ground that the instructions we proposed correctly state the elements of an offense of violation of Section 303 of the Taft-Hartley Act, and that section requires the inducing of employes of other employers, and the jury should have been so instructed; and that the Hawaiian Pineapple Company should not have been included in the instruction as an employer; that the thrust of the act was to meet inducing employes of other employers to cease doing business with the primary employer, and it did not go to inducing employes of the primary employer, in this case the Hawaiian Pineapple Company.” (TR 1454-1455.)

“We take exception to your Honor’s instruction that the defendant unions could be liable for inducing or encouraging, within the meaning of the statute, even though there was no concerted quitting.

The Court. No what?

Mr. Leonard. Even though there was no concerted quitting of employment by the employes themselves. Your Honor will recall that you so instructed. We

think the real thrust of the statute was to prevent the interruption of interstate commerce, and Congress did not intend to penalize unions that engaged in futile acts; that if the encouragement or inducement resulted in nothing there was no violation of the statute.

Similarly, your Honor instructed the jury that it was immaterial whether or not a person actually ceased doing business. That is on the second phase of the statute. Now, we think that what Congress was aiming at was an interruption of commerce, and if the activities complained of did not result in an interruption of commerce there is no violation of the statute.

The Court. You are not intimating that this did not result in an interruption?

Mr. Leonard. I appreciate that, if your Honor please, but the fact is you did instruct the jury—I think I have correctly summarized your Honor's instruction, and we respectfully think that it does not correctly state the provision of the statute, so we do take an exception.

I believe your Honor instructed the jury, as I took notes during the course of your Honor's instructions, that it would be a violation of the statute if any of the defendants told the truck drivers of Hawaiian Pineapple Company that the Port of The Dalles was threatening local working conditions. We take exception to that instruction on the ground that it does not properly state the law as provided for in the Taft-Hartley Act.

The Court. I didn't quite understand that, Mr. Leonard.

Mr. Leonard. That was an instruction that your Honor gave from the bench. It is a little difficult to follow them, but, as I understood the instructions, when your Honor was discussing the elements of the Taft-Hartley Act, your Honor stated—I may be in error, but this is the way I took it down as your Honor went along—that it would constitute a violation of the statute if any of the defendants—and I suppose this had particular reference to the three men who went out to the city limits and talked to the truck drivers—sought to induce them not to come down to the Port of The Dalles, and told the truck drivers of the Hawaiian Pineapple Company that the Port of The Dalles was threatening the working conditions of the local people and therefore sought to induce them not to go in. I believe your Honor so instructed the jury, and if I am correct in that I think that was an incorrect statement of the law, because I think they had a right under Section 8(c), and generally, to go out and tell those truck drivers that in their opinion the Port of The Dalles was threatening their working conditions and to ask them, therefore, not to go into the Port of The Dalles but to support them in their efforts to maintain working conditions. Now I may be in error. Perhaps your Honor did not give that.

The Court. That is not quite what I said. I said that if it was an encouragement and inducement to take concerted action in the course of their employment and one of the objects was to force one person

to cease dealing with another person, that then this was an encouragement, and it didn't make any difference what they told them.

Mr. Leonard. As I said, your Honor, I might be in error because of the circumstances under which it is necessary to jot these notes down, but I take these exceptions under the rules——

The Court. I understand, Mr. Leonard.

Mr. Leonard. If I am in error, I am in error, but if I am not I have got my exception on the record.

The Court. You have your exception." (TR 1457-1460.)

"Mr. Leonard. Very well. Then, if your Honor please, we take exception to that instruction in which you told the jury that there could be inducement or encouragement by talking to representatives of other unions or by talking to other employers, or by bringing pressure upon employes of other employers. I think here we simply disagree—and I say it respectfully, your Honor,—as to what constitutes a cause of action under the statute. When Congress spoke of persuading employes of other employers it is our view that they were talking about persuasion directed to employes whom the union was seeking to cause to quit work, and not by a wholly indirect course of conduct, so we think that there must be direct persuasion rather than indirect persuasion, and we take exception to your Honor's instructions on that ground.

Now, we also take exception to the instruction which your Honor gave to the jury that the mere presence

of the Hawaiian picket in The Dalles did not justify the conduct of either the International or Local 8 and it might be considered in determining the object of the conduct of the International and Local 8.

The Court. I said if they had any connection.

Mr. Leonard. Yes, considered in connection with it. We think——

The Court. I said if they had any connection with his presence that then they might consider that.

Mr. Leonard. I am not sure that your Honor made that statement. If your Honor did so state, I didn't catch it as I was taking my notes.

We have already covered this in our exceptions to your Honor's failure to give our instructions, but your Honor did specifically say to the jury that there was no evidence here that there was a primary strike. We think there is some evidence from which the jury could reasonably make such an inference, so we take exception to that instruction." (TR 1461-1462.)

United States
COURT OF APPEALS

INTERNATIONAL LONGSHOREMEN'S &
WAREHOUSEMEN'S UNION (CIO) and
INTERNATIONAL LONGSHOREMEN'S &
WAREHOUSEMEN'S UNION, LOCAL 8,
Appellants,
vs.

HAWAIIAN PINEAPPLE COMPANY, LTD.,
a corporation,
Appellee.

HAWAIIAN PINEAPPLE COMPANY, LTD.,
a corporation,
Appellant,
vs.

MARTIN E. ADEN, et al,
Appellees.

REPLY BRIEF OF APPELLANT
HAWAIIAN PINEAPPLE COMPANY, LTD.

On Appeals from the United States District Court
for the District of Oregon

KRAUSE & EVANS
GUNTHER F. KRAUSE
DENNIS LINDSAY
GERALD H. ROBINSON

916 Portland Trust Building
Portland 4, Oregon

Attorneys for Appellant
Hawaiian Pineapple Company, Ltd.

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PAUL P. O'BRIEN
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I.

The District Court Failed and Refused to Submit to the Jury the Issue of the Common Law Liability of the Individual Appellees, Regardless of Their Being Co-conspirators, and Erroneously Instructed the Jury Thereon.

A. Hapco's Theory as to the Liability of the Appellees Was not Submitted by the District Court (Reply to Appellees' Brief I, pp. 4-12).

In substance, the argument running through all of appellee's brief is that in the court below Hapco claimed the individual appellees were liable for engaging in a conspiracy to violate the provisions of Section 303 of the Labor Management Relations Act, 1947, which theory the District Court is said to have accepted (Br. 5). However, appellees intimate that on this appeal Hapco has changed its position and now seeks to hold the individuals liable for the particular damage done by each individual appellee (Br. 2, 4-5, 11, 15-16).

In making this argument, appellees are simply in error as to Hapco's position, both in the court below and on this appeal. What appellees have done is to set up two straw men (their notion of Hapco's position below and of its position here) which they then proceed to attack. To clarify the resulting confusion, it is necessary to distinguish among the various theories of liability of the individual appellees.

[Hapco's Theory]

Hapco has always sought to establish the liability of the individual appellees upon the legal basis that they engaged in various unlawful activities, pursuant to an alleged conspiracy with the unions to injure Hapco's business.

Such a position presents a twofold way of establishing the liability of any individual: Either he was part of the alleged conspiracy or he engaged in an unlawful act. In this case Hapco sought to recover against the individual appellees on such a twofold basis: (1) the individual appellees and the unions were part of an unlawful common law conspiracy to injure Hapco's business and property, and (2) the individual appellees participated in the unlawful invasion of the Port dock and the destruction of Hapco's property and injury to its employees and were jointly liable for the wrongs thereby inflicted on Hapco.

Hapco's position in the court below, as here, was and is that, in addition to the conspiracy charge and regardless of whether it was proved, Hapco was entitled to have submitted to the jury the issue of the joint common law liability of the appellees, or any of them, for participating in the unlawful acts involved in the rioting against Hapco. This was unequivocally set forth during the trial by Hapco's counsel, Mr. Krause, when he stated:

" . . . if we are to recover on this conspiracy against the individuals, it has to be on one of two theories: Either that it was all due to their participation in a riot, or a conspiracy in which they par-

ticipated with others to do damage to our business.”
(Tr. 926)

All the significant signposts along the route of the trial bear this out: Hapco's Pre-Trial contention 6 (d) (Tr. 58-59); Pre-Trial issues No. 8, 9, 10, 11, 16 (Tr. 67); Hapco's requested instructions (Tr. 130-131, 133-134); and Hapco's exceptions to the Court's instructions (Tr. 1450-1451).

It should be kept in mind that in the Pre-Trial Order originally submitted to the District Court, Hapco set forth three separate counts or theories: the first two were directed only against International and Local 8 for violating Section 303 (a) (1) and Section 303 (a) (4) of the Act pursuant to a conspiracy between them; and the third one was against the individual appellees and the two unions for committing various unlawful acts (including the riot against Hapco) pursuant to a conspiracy to injure plaintiff's business (Tr. 205, 290, 294). The District Court directed that these three theories be amalgamated or consolidated in one contention, stating that there was only one series of damage involved (Tr. 295, 299).

Accordingly, the broad conspiracy allegation which was thereafter incorporated in Hapco's contentions (Tr. 57-60) was necessarily cast, in part, in terms of the language of Section 303 of the Act. However, Hapco was still proceeding against the unions for violating the Act and against the individuals and unions for various unlawful acts pursuant to a conspiracy to injure its business, as can be seen from the very first requested instruction which Hapco submitted to the District Court:

"The plaintiff, Hawaiian Pineapple Company, Ltd., is seeking to recover damages from the defendant International, from the defendant Local 8, and from the various individual defendants upon different grounds. *On one ground*, the plaintiff is proceeding against the defendant International and the defendant Local 8 on the basis that these two unions have violated the Labor Management Relations Act of 1947. *On another ground*, the plaintiff is proceeding against the various individual defendants and also the defendant International and the defendant Local 8 on the basis that all of these defendants have committed various allegedly unlawful acts pursuant to a conspiracy among themselves as a result of which the plaintiff claims to have been injured in its business and property." (Tr. 123) (Italics supplied)

[District Court Theory]

The District Court submitted to the jury a theory of liability of the individual appellees quite different from that which Hapco requested. It instructed the jury that it could return a verdict against the individual appellees only if (1) one or both unions were first liable under the Act (Tr. 1435, 1440), (2) the individual was a member of a conspiracy with either or both unions (Tr. 1436-1437, 1438, 1440), and (3) the conspiracy was, in effect, to engage in the conduct prohibited by Section 303 (a) (1) of the Act (Tr. 1436-1437, 1439-1440).

It will thus be seen that the District Court instructed the jury on the liability of the individual appellees *only* upon the basis of their being involved in a conspiracy with either or both unions. It did not, and refused to, instruct the jury as to the liability of the individual appellees for having participated in the rioting against

Hapco regardless of whether they were involved in a conspiracy¹.

[Appellees' Straw Men]

From the above review, it is evident that the District Court did not adopt or instruct in accordance with Hapco's position as to the liability of the individuals. Moreover, it is evident that Hapco's position in the court below is the same one which it is now asserting.

We may now lay to rest appellees' two straw men: Their notion that Hapco sought in the District Court to hold the appellees for a conspiracy to violate Section 303 (Appellees' Br. 5); and their apparent notion that Hapco seeks in this Court to hold the appellees liable for the particular damage each has done (Appellees' Br. 2, 4-5, 11, 15-16).

To support these notions, appellees assert that Hapco made no effort to distinguish between the activities of the various individual appellees or to determine the exact amount of damage each one may individually have done (Appellees' Br. 7-11); and that the verdict forms submitted by Hapco did not contain a blank space next to the name of each individual appellee for inserting the damages assessed against him (Appellees' Br. 11).

Insofar as Hapco was proceeding against the individuals for being involved in a conspiracy with the unions to injure and boycott its business, no distinction between

¹Even appellees concede that the instructions of the District Court did not allow the jury to consider the liability of the individual defendants separate and apart from their being involved in a conspiracy with the unions (Appellee's Br. 2).

the activities or responsibilities of any of the individual appellees was required. If the alleged conspiracy were proven, it is axiomatic that each of the individual appellees who had been a part thereof would be liable for the entire damages resulting from the conspiracy.

Similarly, insofar as Hapco was proceeding against the individual appellees for having participated in the unlawful rioting against Hapco, there was once again no legal requirement that Hapco charge or prove the specific damage that may have been done by any one individual appellee.

All of the individual appellees who participated in the unlawful rioting against Hapco were liable for the consequent damages flowing therefrom irrespective of their degree of participation. See: 52 Am. Jur., Torts, Secs. 111, 116, pp. 450, 455; 46 Am. Jur., Riots and Unlawful Assembly, Sec. 18, p. 135; Cooley on Torts (4th Ed.), Secs. 81, 85, 74; Restatement of Torts, Sec. 876. As the Court of Appeals for the Eighth Circuit stated in *Meints v. Huntington*, 276 F. 245 (1921), a case involving an alleged conspiracy by many persons who deported the plaintiff across state lines and beat him.

“ . . . the question as to whether there was a conspiracy became wholly immaterial; *for as to each participant the law is unconcerned with the extent or degree of his activity when it comes to consider the question of liability*, and places all on the same footing, each equally liable jointly and severally, regardless of whether a conspiracy theretofore had been entered into.” (Italics supplied) (276 F. at p. 248).

It was on this basis that Hapco sought only one sum of damages from all of the individual appellees who participated in the rioting. Hapco recognized, however, that if the jury did not find the alleged conspiracy, the damages resulting from the riot might be different and less than the damages resulting from the alleged conspiracy (Tr. 1408-A). Hence Hapco submitted a requested instruction concerning damages to be used by the jury in the event that they found "from a preponderance of the evidence that there was no conspiracy" (Tr. 133).

In a similar vein, the three verdict forms submitted by Hapco reflected its position with respect to the liability of the unions and the individuals (Tr. 1408). The first one was a verdict in favor of the plaintiff and against the defendants and allowed the jury to assess Hapco's damages at one sum of money; the second one was the same, except that all of the defendants were specifically listed and the jury was instructed to strike out the names of the defendants against which the verdict was not returned. These first two forms of verdict covered Hapco's case against the two unions for the charged violation of Section 303, and also against the individual appellees and the unions for engaging in a conspiracy to injure its business. The third form of verdict allowed the jury to return a verdict in favor of Hapco and against the two unions in a blank amount and also permitted them to return a verdict against the individual appellees (whose names were not struck out) in a blank amount. This last form enabled the jury (a) to find against the unions for violating the Act and (b) in the

event that the jury did not find a conspiracy between the individuals and the unions, to find against the individual appellees who participated in the riot against Hapco.

B. Hapco took Appropriate Exceptions in the District Court (Reply to Appellees' Brief II, pp. 12-17).

Like appellees, Hapco agrees with, and has invoked in its answering brief (pp. 54-55) on the cross-appeal herein, the well-settled principle embodied in Rule 51 of the Federal Rules of Civil Procedure that a party may not assign as error the giving or failing to give an instruction unless he objected thereto at the time of trial and stated distinctly the grounds of his objection.

The purpose of Rule 51 in this respect is to call the attention of the Court to any omissions or mistakes in his charge so that he may have an opportunity to correct them before the jury finally retires. See Barron & Holtzoff, Federal Practice and Procedure (Rules Ed., 1950), Vol. 2, Section 1101, et seq.

Such an opportunity was amply afforded to the District Court to correct the errors which Hapco now urges on this appeal. Specific instructions were requested on Hapco's theory that the individual appellees were liable for their riotous invasion of the dock (Tr. 130-131). Specific exceptions were taken to the refusal of the Court to instruct that Hapco could recover against the individuals because of the physical activities in which the individual appellees engaged. It was em-

phasized that a cause of action was stated against the individuals for their riot and other physical activities in stopping Hapco's business (Tr. 1450-1451).

Concurrently, Hapco took specific objection to the instructions of the Court to the effect that there could be no verdict against the individual appellees unless the unions were also found liable, pointing out that the cause of action against the individual appellees was broader than a conspiracy to restrain trade and was directed against and included the riot and other activities that the individual appellees engaged in to physically stop Hapco's business (Tr. 1450).

We submit that the requested instructions, taken together with the exceptions urged against the failure to give them and against the instructions actually given, were sufficient to put the District Court on notice and afford it an opportunity to submit to the jury instructions permitting them to find the individual appellees liable for their unlawful activities in rioting against Hapco on the dock, regardless of whether such activities were pursuant to a conspiracy. As noted below, the cases cited in appellees' brief, if anything, support Hapco².

²*Bercut v. Park Benziger & Co.*, 150 F. (2d) 731, 734 (CA 9, 1945) (Specification of error for failing to give an instruction *held* unavailing where there had been no request at all for such an instruction nor timely objection to the Court's omission to so instruct); *Christensen v. Trotter*, 171 F. (2d) 66, 68 (CA 9, 1948) (Objection to instruction which was not made to the trial court *held* cannot be made for the first time on appeal); *Shevlin-Hixon Co. v. Smith*, 165 F. (2d) 170, 179 (CA 9, 1947) (Specification of error that the trial court failed to instruct the jury properly on certain subjects *held* unavailing where specifications completely disregarded Rule 20 (d) of Ninth Circuit requiring requested instructions be set out "totidem verbis" and where two of the specifications of errors were not even urged to the trial court).

Appellees next assert that the verdict against the unions made harmless the Court's instructions (Tr. 1435, 1436-1437, 1438-1439, 1439-1440) to the effect that the individual appellees could only be liable if one or both of the unions were found liable under the Act and the individual appellee was a member of the conspiracy between either or both of the unions and the individual appellees (Appellees' Br. 13). This is not true. Before an individual appellee could be found liable, the Court still required that he be part of a conspiracy between the unions or either of them and the individual appellees to in effect violate the requirements of Section 303 (a) (1) of the Act. Hapco took exception to this tying together of the unions and individual appellees, pointing out to the Court that the jury could bring in a verdict against the individuals even though they did not bring in one against the unions (Tr. 1450).

It is then said that we did not object to the Court's instructions that "if the sole object of the activities was to protect wages and working conditions, then appellees would not be liable" (Appellees' Br. 13). However, the instruction referred to by appellees relates only to the two unions, not to the individual appellees; and furthermore deals only with Hapco's case against the two unions under the Act (Tr. 1429).

It is next said that Hapco did not except on the ground "that the jury was not permitted to find damages as to any individual other than by virtue of a conspiracy, which is the main claim in its brief" (Appellees' Br. 14). On the contrary, Hapco submitted instructions covering its position that the individual appellees were

liable as a result of their being part of a conspiracy with the unions to injure Hapco's business (Tr. 129-130). Hapco also provided for the possibility that the alleged conspiracy might not be found by submitting instructions covering the liability of the individual appellees for participating in the riot against Hapco (Tr. 130-131) and as the measure of damages (Tr. 133); and excepted to the failure of the Court to instruct that Hapco could recover upon the latter basis (Tr. 1450-1451).

We are unable to discover the inconsistency asserted by appellees (Br. 15) in two of Hapco's requested instructions concerning the liability of the individuals for rioting upon the dock (Tr. 130-131). Both look to the actions of the individual appellees in invading and rioting upon the Port dock; one dealing particularly with the purpose and effect of the invasion (Hapco having contended that the appellees were engaged in boycotting its cargo and business) and the other dealing with the specific activities of the appellees in assaulting Hapco's employees and damaging its property and cargo.

Hapco's requested instruction dealing with the assessment of damages (Tr. 133-134) is, in this part of appellees' brief, properly recognized as proceeding on the theory that in the absence of a conspiracy the individual appellees, who participated in the unlawful activities, are liable for all of the damages sustained by Hapco as a result thereof (Appellees' Br. 15). However, appellees' criticism of this instruction as not permitting the jury to award a certain amount of damages against each individual for the specific wrong he personally committed,

again reflects its misconception of Hapco's position. As we have noted, this instruction embodies the law that, in the absence of a conspiracy, the individual appellees who participated in the riot against Hapco were nonetheless jointly liable for all of the damages done thereby to Hapco.

C. Conspiracy not Gravamen of Hapco's Action (Reply to Appellees' Brief III, pp. 17-23).

Appelles seek to avoid the application of the principle that a plaintiff may recover against several defendants engaging in tortious acts against it, even if an alleged conspiracy is not proved, by reference to a distinction sought to be drawn in 152 A.L.R. 1147 to the effect that in some cases conspiracy must be proved in order to impose joint liability³.

Appellees ignore, however, the fact that cases said to constitute an exception to or a limitation upon the general principle involve situations in which reliance is placed upon the acts of several defendants, no one of

³The annotator has expressed his conception of cases said to form a limitation upon the general principle that conspiracy is not the gravamen of an action, as follows:

"Where liability is dependent upon some theory of conspiracy, in the sense that only joint or co-operative action apart from collective conduct that no individual can be separately charged with responsibility for the damage claimed, upon the ground urged, as shown by the inherent nature of the wrongful conduct or the manner in which it is alleged, and there is, in such a situation, no separate wrong which would support an action apart from collective conduct or participation based upon a concert of design or conscious effort, failure to prove an allegation of conspiracy is tantamount to a failure of the action." (152 A.L.R. at 1154)

whom standing alone would be liable, or involves several acts different in character and in time, in some of which not all of the defendants participated. See 152 A.L.R. at 1148 and 1154. As a reading of the cases said to constitute a limitation will show, the case at bar can hardly be lumped with them. Here all of the individual appellees were alleged to be engaged in the same unlawful activities at the same time and place and furthermore the act of any one individual appellee standing alone was unlawful and actionable.

Next, appellees assert that "the authorities are in agreement" that a distinction cannot be made between liability for a conspiracy and liability for a riot (Appellees' Br. 19). Appellees, however, have not cited "the authorities" to which they refer, unless it be *Salem Manufacturing Company v. First American Fire Insurance Company of New York*, 111 F. (2d) 797 (CA 9, 1940), in which neither the language nor the ratio decidendi of the case distinguishes between a conspiracy and a riot or requires proof of a prior conspiracy in order to show a concert of action.

Regardless of whether Hapco proved its alleged conspiracy, we submit that the law is clear that joint liability may be imposed upon the appellees who acted together in the infliction of wrongs against it. All that is required to impose such joint liability is, in effect, a concert of actions by two or more persons who commit the wrong complained of. *Meints v. Huntington*, 276 F. 245 (CA 8, 1921); *Martin v. Ebert*, 245 Wisc. 341, 13 N.W. (2d) 907 (1944). Accord, *Reyher v. Mayne*, 90

Colo. 586, 10 P. (2d) 1109 (1932); *Benson v. Ross*, 143 Mich. 452, 106 N.W. 1120 (1906); *Oliver v. Miles*, 144 Miss. 852, 110 So. 666 (1926); *Troop v. Dew*, 150 Ark. 560, 234 S.W. 992 (1921). That a jury can infer such a concert of action from the nature and circumstances of the defendants' wrongful acts is clear. See *Calcutt v. Gerig*, 271 F. 220, 222 (CA 6, 1921).

As one well-known commentator has expressed it, joint liability may be imposed upon several tort feasons even if these is no pre-arranged plan or agreement, if "one person acts to produce injury with full knowledge that the others are acting in a similar manner and that his conduct will contribute to producing a single harm." Harper on Torts (1933 Ed.) p. 676.

Appellees also suggest that the instructions of the District Court did not really require the jury to find that the liability of the individual appellees depended upon their having been part of a conspiracy with the unions. We submit that a reading of all of the instructions dealing with the liability of the individual appellees can only lead to the conclusion that individual liability depended upon being a member of a conspiracy between either or both of the unions and the individual appellees (Tr. 1436-1437, 1438, 1440). Appellees have quoted an isolated part of the Court's instruction (Tr. 1436-1437), but in so doing they have omitted the key portion of it dealing with the nature of the conspiracy of which the individual appellees had to be a member, namely a conspiracy in effect to violate the Act by inducing or encouraging the employees of any employer by concerted

action in the course of their employment to refuse to transport, handle or work upon the pineapple cargo, or to perform any services in connection therewith, with the object of forcing any employer or any person to cease doing business with any other person.

Appellees also say that under the instructions requested by Hapco the jury might have been led to believe that an individual, who was part of a group of which some members were involved in unlawful activities, might be held for all of the damages committed by any members of the group even though there was no concert of action between them (Appellees' Br. 20-21). We cannot follow this contention. Hapco's requested instructions clearly required the jury to find that the individual appellees invaded the dock together and there engaged in a riot, and further specifically provided that a verdict should only be returned against such individuals who "participated" in such an invasion and riot (Tr. 130-131).

Finally, appellees again suggest that Hapco did not take any exception to any instruction "by which the jury was required to find that the individuals were engaged in a conspiracy with the unions in order to be held liable." (Appellees' Br. 22). In so saying, appellees disregard the exceptions which appellee took (Tr. 1450) in which Hapco stated that its theory was that "there is a cause of action stated against them [the individuals] that was broader than a conspiracy to restrain trade and that is to just physically stop a business operation in connection with the riot and other activities that they engaged in."

II.

The Labor Management Relations Act, 1947, Has Not Pre-empted the Field of Individual Liability for Tortious Conduct (Reply to Appellees' Br. pp. 23-29).

Hapco has no quarrel with appellees' contention that a suit for damages under Section 303 of the Labor Management Relations Act may not be brought against an individual union member (in contrast to a "labor organization") for his having engaged in conduct prohibited by that section. For the violation of Section 303 (a) (1) of the Act involved in this case, Hapco has not and is not seeking to impose liability on the individual appellees but only on International and Local 8.

Nor do we have any quarrel with the so-called doctrine of pre-emption that where Congress has acted in an area of concurrent federal and state jurisdiction (such as the regulation of labor relations), state statutes or common law are superseded by the federal law, provided the intention of Congress to nullify the state law is clear and unequivocal. See 11 Am. Jur., Commerce, Secs. 22, 23 and 24, pp. 23-27. But we cannot accept the conclusion which appellees desire to draw from this doctrine, viz, that since the Act has limited liability for violations to labor organizations, "individuals cannot be subjected to liability merely because their conduct may give rights to a common law action or an action based upon a state statute" (Appellees' Br. 28).

Such a conclusion involves a misapplication of the doctrine of pre-emption. It presents the question of whether Congress in limiting damage suits under Section 303 to "labor organizations" acted in such a way to invalidate state common law that individuals are liable for their torts inflicted in the course of labor strife.

A review of the legislative history indicates that the only intention of Congress was to limit the scope and application of Section 303 to labor organizations and not to restrict the application of state law to individuals for their tortious acts⁴. Mere silence by Congress does not justify the negation of state law; and the failure of Congress to include individuals within Section 303 does not thereby preclude the application of state common law.

In *Direct Transit Lines v. Local 406*, 199 F. (2d) 89 (CA 6, 1952), relied on by appellees (Br. 26-28), no individual defendants were involved. The question before the Court was whether state law could regulate the activities of labor organizations which were exclusively within the scope of the Act, and not whether silence by Congress excluded the application of state law to the torts of individuals.

More in point on appellees' contention is *Utah Labor Relations Board v. Utah Valley Hospital*, 235 P. (2d) 520 (Utah, 1952), where a hospital refused to obey the order of a state agency that it enter into collective bar-

⁴Senate Report No. 105, 80th Cong., 1st Sess., pp. 54-56; 93 Cong. Rec. 4677-4681, 4770, 4834, 4837, 4839-4840, 4843, 4847, 4858, 4859-4860, 4867, 4868, 4871, 4872-4873, 4874; House Report No. 510, 80th Cong., 1st Sess., p. 67; 93 Cong. Rec. 6445, 6536.

gaining, contending that Congress had pre-empted the field and thereby excluded state control. Since Congress had expressly excluded non-profit charitable hospitals by amendment from the Labor Relations Act, the Court held that the field was therefore left open to regulation by the state, stating (at p. 523);⁵

"It would seem paradoxical indeed to hold . . . that the hospital is beyond the control of the Utah Legislature because it is controlled by the act of Congress, which by its very terms excludes the Hospital from its operation."

So in the case herein, it is inconceivable that the individual appellees are beyond the control of state common law because they are assertedly controlled by Section 303 of the Act, which does not even mention individuals. Congress never did bring within the scope of the Act the liability of individuals for their tortious conduct in the course of secondary boycotts. It considered and rejected language which would have permitted Section 303 damage suits against individuals. Having thus never been within the scope of Federal legislation, it is difficult to conceive why state common law should be impaired by the silence of Section 303 with respect to the liability of individuals.

⁵The hospital later presented its argument that the state agency was without jurisdiction because the Act had preempted the field to a Federal District Court, which dismissed its complaint, and to the Court of Appeals of the Tenth Circuit which affirmed the dismissal. *Utah Valley Hospital v. Industrial Commission of Utah*, 199 F. (2d) 6 (1952).

CONCLUSION

We submit that Hapco should be granted a partial new trial on the limited and separable issue which has never been passed upon in this case: the liability of the appellees for their tortious conduct in the riot staged against Hapco on the Port dock.

Hapco raised this ssue in the District Court and supported it with unchallenged evidence of the wrongs done to it by the individual appellees. In all fairness, we submit, that Hapco is entitled to its day in court on this issue.

Respectfully submitted,

KRAUSE & EVANS,
GUNTHER F. KRAUSE,
DENNIS LINDSAY,
GERALD H. ROBINSON,

Attorneys for Appellant,
Hawaiian Pineapple Company, Ltd.

No. 13,673

United States Court of Appeals
For the Ninth Circuit

INTERNATIONAL LONGSHOREMEN'S AND WAREHOUSE-
MEN'S UNION (CIO) and INTERNATIONAL
LONGSHOREMEN'S AND WAREHOUSEMEN'S UNION,
LOCAL 8,

Appellants,

vs.

HAWAIIAN PINEAPPLE COMPANY, LTD.,
a corporation,

Appellee.

HAWAIIAN PINEAPPLE COMPANY, LTD.,
a corporation,

Appellant,

vs.

MARTEN E. ADEN, et al.,

Appellees.

APPELLANTS' PETITION FOR A REHEARING.

GLADSTEIN, ANDERSEN, LEONARD & SIBBETT,
240 Montgomery Street, San Francisco 4, California,

Attorneys for Appellants and Petitioners

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**United States Court of Appeals
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VS.

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APPELLANTS' PETITION FOR A REHEARING.

*To the Honorable William Healy, Homer T. Bone and
Richard H. Chambers, Judges of the United
States Court of Appeals for the Ninth Circuit:*

'Come now International Longshoremen's and Ware-
housemen's Union and International Longshoremen's
and Warehousemen's Union, Local 8, appellants here-

in, and file this their petition for rehearing in the above-entitled cause.

I.

THE AGENCY QUESTION.

This Court's opinion on this phase of the case begs the issue. It is not enough to say that a union is responsible "... if [it] puts or lets an officer or other representative get into a position where he can and does cause trouble ..." (Slip Opinion p. 7). The issue is, who should have decided whether the union placed Meehan, Gettings, Bodine and Schmidt in such a position, or, indeed, if any of them occupied such a position—the jury or the trial court?

Our complaint was not, as this Court seems to think, that the trial court failed to give "long instructions" (Slip Opinion p. 7), but rather that it gave one (quite short) peremptory instruction which, despite substantial conflicts in the evidence (at least as to Meehan, Bodine and Schmidt) decided a basic factual issue adversely to the unions. It was our contention that by this peremptory instruction the trial court prevented the jury from deciding a fact issue which should have been submitted to it.

Nowhere does this Court in its opinion recognize that this is our contention. It is not surprising therefore that nowhere in its opinion does this Court meet the contention. We stated our position as simply as

we knew how at page 26 of our reply brief, to which once again we respectfully refer this Court.

II.

THE INCONSISTENCY OF THE VERDICTS.

If this Court failed to recognize the issue we sought to pose with respect to the agency question, the same cannot be said of the argument we made regarding the inconsistency of the verdicts. The opinion shows that this Court indubitably did recognize the argument; however, it equally shows that this Court failed to completely meet the argument. This Court prefaces its discussion of the point by saying "... it does seem a little difficult to understand why the jury found International and Local liable and did not also hold some of the leaders responsible." The Court then seeks to resolve this "little" difficulty by suggesting that the jury "may have thought" of one of four or five different theories which might have conceivably, perhaps, justified its verdicts. Of course, none of these theories, which are so carefully spelled out in this Court's opinion, were advanced on the trial, and none of them corresponded to anything submitted to the jury in the trial court's charge. Such *ex post facto* rationalization by an appellate court is not a satisfactory answer to a contention that the jury, without proper guidance, acted inconsistently and irrationally.

The state of this Court's thinking on this problem is reflected not only in its speculation as to the exist-

ence of “possible combinations of facts . . . which would make the verdicts consistent” (Slip Opinion p. 11),¹ but more clearly appears in the concluding sentences of the opinion.²

“ . . . there was probably an inconsistency in the verdict; but, as we have held, it is a case where the jury had a right to be inconsistent. But finally we cannot say there was any inconsistency.” (Slip Opinion p. 14.)

Yes, no, maybe; but anyway the judgment is affirmed!

III.

THE ELEMENTS OF A TAFT-HARTLEY VIOLATION.

Except for two passing references in its opinion, this Court contents itself in disposing of our points here with the observation that “specifications of errors not mentioned . . . have [been] examined and found without merit” (Slip Opinion p. 11). We respectfully suggest that there is sufficient merit in any one of the following points to require at least some comment from the Court:

¹The statement immediately following (“Also we are sure an additional quantum of proof was required as to the officials of the International and Local who were actually named as defendants than as against the Unions” [Slip Opinion p. 11]) finds no support whatsoever in the record: either in the evidence or in the argument or in the charge. If we may put a rhetorical (and respectful) question to the Court: *What* is the additional quantum of proof required as to the officials which was not required as to the unions?

²That the Court recurs to this point some pages after it had presumably laid it to rest indicates that it is bothersome, like a toothache that one cannot quite ignore.

1. There was legitimate primary activity at The Dalles.

2. It was error to prevent the unions from establishing that Pineapple was an *alter ego* of the struck Hawaiian corporations.³

3. The instructions on secondary boycott were confusing, inconsistent and ambiguous and therefore erroneous.⁴

4. Other instructions, *e.g.*, that the railroad was a "person" within the meaning of the Act, are clearly erroneous.

5. The evidence was overwhelming that Pineapple's business was not interfered with by reason of union activity but because other companies for reasons of their own did not want to or, because of lack of equipment, could not engage in business with Pineapple.

The Court recognizes that in this case new legal fields are being explored.⁵ That being so, a full and

³This Court's statement that this contention "does not seem to have been proved to the point of any jury question" (Slip Opinion p. 6) overlooks the fact that the trial court by its rulings excluded the proof which was offered on this very issue.

⁴This Court's total failure to discuss this issue should be compared with the careful handling of the problem found in a recent opinion of the Second Circuit (*Douds v. International Longshoremen's Association*, 224 F.2d 455).

⁵"Surprisingly, there is little case law yet on the agency feature of the section" (Slip Opinion p. 7).

"[The instructions] have avoided well the pitfalls that one might expect in a new field" (Slip Opinion p. 11).

"At the time the case was in the District Court, *United Construction Workers v. Laburnum Construction*, 347 U.S. 656, and other cases, had not been decided" (Slip Opinion pp. 11-12).

comprehensive discussion of the points just mentioned, which were thoroughly briefed and argued by all parties, should have been contained in the Court's opinion.

IV.

MITIGATION OF DAMAGES.

This Court recognizes that the arguments advanced by the unions on this point "are quite convincing", but refuses to accept them because the jury "may have thought" that Pineapple wished to hold on to its trade or because Pineapple "may have reasonably thought" its troubles would soon be over (Slip Opinion, pp. 8-9).

Here again the Court speculates to support the jury's verdict. There was nothing in the evidence or the charge which justifies such speculation. And while an appellate court will properly go far to uphold a jury's verdict, we submit that it cannot go so far as to find itself outside the record of the case.

CONCLUSION.

Although the Court disclaims the notion that the evidence relating to violence motivated its decision, it seems obvious to us that this was the case. Throughout the opinion are constant references to this factor

which concededly is irrelevant when one seeks "the proper answer to legal questions" (Slip Opinion p. 13). The constant iteration and reiteration of this factor clouded the eyes of the jury and the trial court, and we respectfully submit, of this Court as well. Absent that element, we are confident that this Court would not permit the judgment against the unions to stand.

Of course, compounding the evil is the fact that there is no showing that the unions or any of their representatives were responsible for the violence (cf. *United Construction Workers v. Haislip Baking Co.*, 223 F.2d 872, 879). On the contrary, the record is clear that what precipitated the riot was the unplanned, unpremeditated outburst led by persons who might just as well (for all the record shows) have been provocateurs as responsible union members.⁶

To correct this manifest injustice, we are petitioning for a rehearing of this entire case and, since many of the issues are indeed novel, we respectfully pray that this petition be heard by the Court *en banc*.

Dated, San Francisco, California,
December 14, 1955.

Respectfully submitted,
GLADSTEIN, ANDERSEN, LEONARD & SIBBETT,
By NORMAN LEONARD,
*Attorneys for Appellants
and Petitioners.*

⁶Cf. Tr. 598; 630-633.

CERTIFICATE OF COUNSEL

I hereby certify that I am of counsel for appellants and petitioners in the above-entitled cause and that in my judgment the foregoing petition for a rehearing is well founded in point of law as well as in fact and that said petition for a rehearing is not interposed for delay.

Dated, San Francisco, California,
December 14, 1955.

NORMAN LEONARD,
*Of Counsel for Appellants
and Petitioners.*

United States
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for the Ninth Circuit

INTERNATIONAL LONGSHOREMEN'S &
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**PETITION OF APPELLANT HAWAIIAN PINEAPPLE
COMPANY, LTD., FOR REHEARING**

KRAUSE, EVANS & LINDSAY

GUNTHER F. KRAUSE

DENNIS LINDSAY

Attorneys for Appellant and Petitioner

Hawaiian Pineapple Company, Ltd.

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United States
COURT OF APPEALS
for the Ninth Circuit

INTERNATIONAL LONGSHOREMEN'S &
WAREHOUSEMEN'S UNION (CIO) and
INTERNATIONAL LONGSHOREMEN'S &
WAREHOUSEMEN'S UNION, LOCAL 8,

Appellants,

vs.

HAWAIIAN PINEAPPLE COMPANY, LTD.,
a corporation,

Appellee.

HAWAIIAN PINEAPPLE COMPANY, LTD.,
a corporation,

Appellant,

vs.

MARTIN E. ADEN, et al.,

Appellees.

**PETITION OF APPELLANT HAWAIIAN PINEAPPLE
COMPANY, LTD., FOR REHEARING**

*To the HONORABLE WILLIAM HEALY, HOMER
T. BONE and RICHARD H. CHAMBERS, Circuit
Judges of the United States Court of Appeals for the
Ninth Circuit:*

Appellant Hawaiian Pineapple Company, Ltd. (here-
inafter "Pineapple") respectfully petitions for a rehear-

ing of the judgment of this Court affirming the exoneration of the individual defendants-appellees Martin E. Aden, et al, on the grounds that:

(1) The Court failed to meet Pineapple's main contentions on this appeal, as set forth in its Specification of Errors 1 and 2 (attached hereto as Appendix A).

(2) The Court erred in its "all-or-none" theory which does not answer Pineapple's contentions.

(3) The Court erred as to the nature of Pineapple's cause of action against the individual defendants and as to the legal bases of the liability of the individual defendants.

The Need for a Rehearing

Perhaps the need for a rehearing is nowhere more clearly mirrored than in the statement of this Court that it found the Pineapple's action against the individual defendants "all very, very confusing" (p. 11).

While we appreciate the Court's absolution that this confusion was not due to the lack of skill of counsel, we believe the circumstances demand that we be permitted to make another presentation before this Court, for to us Pineapple's action against the individual defendants was a straightforward one, which, through error on the part of the trial court, was never properly put before the jury for their verdict.

Since our aggrievement with the trial court, as with this Court, involves the same fundamental point, we shall not fragmentize this petition into compartments.

Instead we propose to make an overall presentation of Pineapple's cause of action against the individuals, pointing out wherein the District Court erred and wherein this Court has not met or answered this error, all of which lead us to but one conclusion — Pineapple was adversely prejudiced by the failure and refusal of the trial court to submit to the jury the issue of, and Pineapple's requested instructions dealing with, the liability of the individual defendants (separate from any conspiracy with the unions) as a result of the riot on the port of The Dalles dock, which issue was raised by pleadings and Pre-Trial Order and supported by the evidence.

The Nature of Pineapple's Action against the Individual Defendants

This Court states in its opinion that:

“As we see it, the gravamen of Pineapple's complaint as submitted to the jury on the individuals was that they violated Section 303 of the Labor-Management Relations Act” (p. 12).

To view Pineapple's cause of action against the individuals in this vein reflects an erroneous notion of Pineapple's action. Generally, Pineapple's lawsuit was brought to recover damages to its business and its property which it sustained by reason of the activities of the two unions and the individual defendants. Specifically, plaintiff proceeded against the two unions on the grounds that their activities constituted a violation of the Labor-Management Relations Act; and Pineapple proceeded against the individual defendants on the basis that the individual defendants and the two unions had committed various

unlawful acts (including the physical invasion and riot on the dock) pursuant to a conspiracy to injure Pineapple's business and property¹.

Accordingly, in its action Pineapple predicated the liability of the individual defendants upon the legal basis that they had engaged in various unlawful activities, pursuant to an alleged conspiracy with the unions to injure Pineapple's business. The individual defendants could therefore be liable in two ways: they and the unions were part of an unlawful conspiracy to injure Pineapple's business and property; or the individual defendants had engaged in unlawful acts, the principal one being the unlawful invasion of the dock and the destruction of Pineapple's property and injury to its employees. If the conspiracy charge was not proved, Pineapple was still entitled (as conceded by the individuals on page 3 of their supplemental brief) to recover for the damages it sustained as a result of the unlawful acts of the individual defendants.

¹Witness the first requested instruction which Pineapple submitted to the trial court:

"The plaintiff, Hawaiian Pineapple Company, Ltd., is seeking to recover damages from the defendant International, from the defendant Local 8, and from the various individual defendants upon different grounds. On one ground, the plaintiff is proceeding against the defendant International and the defendant Local 8 on the basis that these two unions have violated the Labor-Management Relations Act of 1947. On another ground, the plaintiff is proceeding against the various individual defendants and also the defendant International and the defendant Local 8 on the basis that all of these defendants have committed various allegedly unlawful acts pursuant to a conspiracy among themselves as a result of which the plaintiff claims to have been injured in its business and property." (Tr. 123.)

We call the Court's attention to the statements of Pineapple's counsel when he advised the trial court that "... If we are to recover on this conspiracy against the individuals, it has to be on one of two theories: Either that it was all due *to their participation in a riot*, or a conspiracy in which they participated with others to do damage to our business" (Tr. 926). In other words, one of the two bases on which Pineapple sought to establish liability on the individual defendants was for their joint responsibility for participating in the riot and the damages that were done therein and flowed therefrom².

We can readily understand how one, who had not participated in the pre-trial proceedings and was first reading the contentions of the Pre-Trial Order, would conclude that Pineapple was only proceeding against the individual defendants for a violation of Section 303 of the Labor-Management Relations Act. One of the principal charging paragraphs in the Pre-Trial Order is cast in terms of the many statutory elements necessary to bring a Section 303 damage suit under the Act. A study of the pre-trial proceedings, however, shows the reason for this.

As noted above, Pineapple was proceeding against the unions for violating Section 303 of the Act, besides proceeding against the individuals and unions for unlawful acts under the common law. Since the trial court took the view there was only one series of damages involved,

²See also Pineapple's Pre-trial contention 6 (d) (Tr. 58-59); Pre-trial issues No. 8, 9, 10, 11, 16 (Tr. 67); and Pineapple's requested instructions set out in Appendix A hereto.

the trial court directed that in the preparation of the Pre-Trial Order that Pineapple's theories as to the liability of the unions and the individuals be amalgamated or consolidated in one contention (Tr. 295, 299). Necessarily, the amalgamated result looks on the surface mostly like a Section 303 violation charge, since it requires so many different factual elements to charge a violation of this section. However, the form of the Pre-Trial Order should not allow this Court to lose sight of the fact that Pineapple specifically sought to establish liability on the individual defendants for their participation in the riot and the ensuing damages.

In line with its alternative theory as to the liability of the individual defendants, Pineapple submitted at least three specific instructions to the trial court dealing with the riot and the liability of the individual defendants therefor. These instructions are set out in Appendix A attached hereto and the failure to give them was assigned as Specification of Error 2 on this appeal.

Pineapple was entitled to have these instructions submitted to the jury because the evidence was undisputed that at least 60 of the individual defendants had participated in the riot on the dock and all of the other individual defendants, except one, were at or near the dock on the day of the riot. Moreover, as will be developed hereafter in more detail, the damages sustained by Pineapple were such that it contended they all flowed and resulted from the riot; and the proof was such that a factual issue was posed for the jury to determine the damages which were the proximate result of the riot.

Pineapple's Specification of Errors

The trial court did two completely unexpected things in its instructions on the liability of the individual defendants: the one in what it did instruct and the other in what it failed to instruct or even submit to the jury.

First, the trial court (to the surprise of all parties, no such instructions having been previously submitted or discussed) instructed the jury that an individual defendant could only be found liable (1) *if* one or both unions was found liable under the Act (Tr. 1435-1440); (2) *and if* the individual was a member of a "conspiracy" between either or both of the unions and the individual defendants (Tr. 1436-1437, 1448-1450); (3) *and if* the "conspiracy" involved was one (a) to restrain trade and commerce between Hawaii and any state *and* (b) to violate (in effect) the provisions of Section 303 (A) (1) of the Act.

This Court has agreed with Pineapple's objection that the trial court erred in instructing that an individual could not be found liable unless the unions were first found liable; but has gone on to hold that the jury finding of liability against the unions in effect cured this error³.

³Had the trial court's instructions been confined solely to tying together the liability of the unions and the individuals, we might agree that the trial court's erroneous instruction had been cured by the verdict. We fail to see how this Court can claim such a "cure" in view of the trial court's further instructions that the liability of an individual was dependent on his having entered into a conspiracy with either or both unions to restrain trade between Hawaii

We ask this Court, however, to note that Pineapple's exceptions⁴ went further than objecting to union liability as a prerequisite to individual liability and, together with Pineapple's other exceptions, put the Court on fair notice of Pineapple's cause of action against the individuals for damages flowing from "to just physically stop a business operation in connection with the riot and other activities they engaged in."

The second unexpected action of the trial court was that it failed to submit to the jury the issue of the liability of the individuals, separate and apart from any conspiracy with the unions, and refused to give any instructions whatsoever along the lines requested by Pine-

and any state and to (in effect) violate Section 303 (A) (1) of the Act. As we pointed out in our Opening Brief (pp. 52-55) we know of no basis in law, under the issues of this case, for these further instructions. This Court has remained silent on this point, yet it was just as erroneous for the trial court to require that the individuals be co-conspirators of a specified conspiracy with the unions as it was for the trial court to instruct that the liability of the union was a prerequisite to individual liability. A verdict holding the unions liable does not cure erroneous instructions as to the nature or elements of a charged conspiracy between the unions and the individuals.

⁴"Then the Plaintiff Hawaiian Pineapple Company will take an exception to the instruction that there can be no verdict against the individuals in that case unless the unions are also found liable, because there is a cause of action stated against them that was broader than a conspiracy to restrain trade, and that is to just physically stop a business operation in connection with the riot and other activities that they engaged in. That was one of the counts under the original complaint, and it seems to me that they could bring in a verdict in the Hawaiian Pineapple Company case even though they did not bring one against the unions." (Tr. 1450).

apple (set out in Appendix A attached hereto) as to the liability of the defendants for their unlawful invasion of the dock.

Thus, the legal liability of an individual defendant in this case was submitted to the jury *solely* on the basis of whether he was a conspirator with either or both unions to restrain trade between Hawaii and any state and to violate the prohibitions of Section 303 (A) (1) of the Act. This was improper, as Pineapple pointed out⁵, again putting the trial court on fair notice that Pineapple was entitled to recover against the individual defendants for their unlawful activities.

**This Court's "all-or-none"
Theory is no Answer**

It is difficult to determine the ground or grounds on which this Court has affirmed the verdict exonerating the individual defendants.

The central theme of this Court's opinion appears to be that Pineapple tried its case against the individual defendants on an "all-or-nothing" basis of getting the same total set of damages from the individual defendants as from the two unions; and the verdict in favor of the

⁵"Then my second point is the failure to instruct in the Hawaiian Pineapple Company case that the plaintiff could recover against the individuals and/or unions on a theory other than the Taft-Hartley Act, because there was a diversity of citizenship and they engaged in physical activities that prevented us from carrying on our business which they were in no event, under any theory of labor dispute or anything else, entitled to engage in. We would be entitled to recover on that theory if there were no Taft-Hartley action involved here." (Tr. 1450-1451).

individuals meant that the jury decided Pineapple was not entitled to the same damages against the individual defendants as it was entitled to against the union. In a nutshell, this Court's notion seems to be that by stating an oral preference for a form of verdict in which only one amount of damages could be inserted by the jury as against the unions and the individual defendants found liable, Pineapple placed itself in a "strait-jacket" as to damages⁶.

This Court's opinion does not answer Pineapple's position on this appeal. Whether or not Pineapple, willingly or through the action of the trial court, was placed in what this Court calls a "strait-jacket" as to damages, the

⁶This Court's decision appears to stem from the following statements in its opinion:

P. 9 — "We must keep in mind that the trial court held the plaintiff to an all-or-nothing recovery against the individuals and required as a condition of their liability that a union first be found liable."

P. 10 — "In such an event the strait-jacket as to damages — the same amount against the individuals as against International or Local — would have justified the jury in returning a verdict in favor of the individuals."

P. 10 — "... but still under the no-liability theory for less than all acquiesced in by plaintiff, it affords no basis to attack the verdict because we know that certain individuals were necessarily liable for a fraction of the total damage."

P. 12 — "... distilling the case down, we think that Pineapple did in the end project its case for liability on the basis of a common sum against all, that is, as against all defendants found responsible."

P. 13 — "... when counsel for Pineapple said, in discussing the form of the verdict, the following: ... at that point the trial court was entitled to put Pineapple on an all-or-nothing basis for the same amount as to each defendant found liable."

P. 14 — "... Pineapple did not focus on the damage at the dock, but let the case go on an all-or-nothing basis."

uncontraverted fact remains that *there was never presented to the jury* for its determination Pineapple's contentions that the damages which it sustained in this case flowed from the riot and the resulting consequences and that the individual defendants who participated in the physical invasion of the dock and the riot were jointly liable for the damages proximately resulting therefrom.

The flaw in this Court's reasoning, as we see it, is its assumption that there was a significant difference between the total damage for which the unions were held liable and the total damage for which the individual defendants could have been held jointly liable. We know of no basis for any such assumption in the record. The proof was such that every item of damage that might be said to be included in the verdict obtained against the unions certainly raised a question of fact for determination by the jury as to whether it was also the proximate result of the activities of the individual defendants in staging, and as an aftermath of, their riot.

The items of damage for which Pineapple is seeking recovery are set out in the Pre-Trial Order (Tr. 61-63) and were supported by extensive testimony in the record (Tr. 486, 686, 916, 918-919, 935-949, 956, 958, 988-996, 1038, 1040, 1048, 1051-1052, 1056-1057, 1060, 1061, 1066-1067).

Admittedly, there can be no dispute that the damage directly done in the riot was the proximate result of the participating individual defendants: truck repairs (Tr. 1038); crane repairs (Tr. 1040); lost cases of pineapple (Tr. 918-919, 1048); cut mooring lines and destroyed

gangway (Tr. 1061, 1062); medical and hospital expenses for injured employees (Tr. 1066-1067). Next, there were the consequential damages sustained at The Dalles, which Pineapple contended were the proximate result of the riot: charter hire of the ocean-going tug ONO and the barge YFN while they were forced to be idle (Tr. 1051-1052, 1061), special police costs (Tr. 1060), expenses of Pineapple's employees (Tr. 1058), additional freight costs of having to truck cargo to Portland (Tr. 1067). Many other items of damages at The Dalles were excluded by the trial court, but such as were admitted in evidence were viewed as "direct" losses and warranted jury determination.

Finally, there were the consequential damages at Pineapple's plant at San Jose, California, which consisted of the additional expense to which Pineapple was put by reason of not being able to obtain the pineapple in time to directly can fruit cocktail. It will be recalled that the riot put Pineapple's crane for unloading from the barge out of commission for about ten days after the riot (Tr. 1040). Pineapple's plant had previously purchased large quantities of perishable fruits to be mixed with cherries and with pineapple from the barge in the preparation of canning of fruit cocktail. To prevent the spoilage of these fresh fruits while awaiting the arrival of the pineapple on the barge, Pineapple's plant was forced to process and can them into a mixture known as "fruit mix". By the time the crane was once again in operation, the San Jose plant had been forced to process and can all of the fresh fruit.

Since it would have been possible to hold off the canning of the fresh fruit from September 26 until September 29, the day when the pineapple would have arrived at the San Jose plant had it not been for the riot on September 28th, Pineapple's position before the jury was that all of the additional expenses which it incurred by reason of having to convert the fresh fruit into fruit mix and thereafter to re-process it into fruit cocktail upon the eventual receipt of the pineapple, could be attributed to the failure to receive the pineapple as a result of the riot. In other words, Pineapple's position was that this was a question of fact to be passed upon by the jury as to whether or not this item of damage was a proximate result of the riotous activities of the individual defendants.

It is, of course, possible to fly-speck a few small items of damage which *might* be said to be attributable to the unions but not to the aftermath of the riot of the participating individual defendants⁷. We cannot conceive this Court would choose to rely on any such differences as justification for holding that Pineapple was *not* entitled to have submitted to the jury the total harm perpetrated by the individual defendants as the result of the riot, which total harm was substantially, if not identical, with the total harm effected by the unions.

⁷For example, e.g., the charter hire of the tug ONO and the barge YFN for September 26 and September 27 or the cost of special police on these two days.

Failure to Meet Pineapple's Specification of Errors

After the jury returned its verdict in favor of the individual defendants, Pineapple moved for a partial new trial on the same grounds which have been raised in this appeal (Tr. 142-145). In denying this motion, the trial court neither stated Pineapple's contentions, as they were submitted in its motion, nor answered these contentions⁸.

Once again in this appeal Pineapple in its specification of errors presented the same contentions which were presented in its motion for a partial new trial. Once again, we respectfully submit that Pineapple's contentions have not been stated, as raised by Pineapple⁹, nor have these contentions been answered.

⁸The only reference to Pineapple's motion for a partial new trial in the twenty-eight-page opinion by the trial court was as follows:

"Before dealing with defenses, it is well at this point to dispose of plaintiff Pineapple's motion for new trial upon the ground that the individual defendants could have been held upon the same ground and the same evidence as were the unions. Pineapple here repeats the same error as was made by the unions in contending that the verdicts were inconsistent.

"It is true that the Court may not have accurately stated the elements of liability at common law as to the individuals. But no exceptions were taken to the instructions upon this ground. The subject is highly complicated and the question of whether the state law or a common law adopted by the federal enactments applies is extremely nebulous. Certainly, the ground chosen by Pineapple for objection and exception cannot be maintained. The jury found against Pineapple on a fair statement of the common law. This motion for new trial is therefore denied." (Tr. 165.)

⁹So this Court states: "... although complaint is made by Pineapple that the jury was not permitted to consider the liability

When this Court states that Pineapple “did not focus on the damage at the dock, but let the case go on an all-or-nothing basis”, it is not dealing fairly with Pineapple. If there was one aspect of the case on which Pineapple focused above everything else (and on this we guarantee that opposing counsel will agree), it was the physical invasion of and the riot on the dock and the ensuing and resulting damage to Pineapple.

If there was any letting “the case go on an all-or-nothing basis”, it was that the participating¹⁰ individual defendants were liable for the common sum or total set of damages involved on the basis of (1) the conspiracy with the unions to injure Pineapple’s business or (2) the riot and consequential damage therefrom. Regardless of whether or not the conspiracy basis for the liability of the individual defendants was proven, Pineapple was still entitled by reason of its pleadings, proof, and requested instructions, to have the alternative basis for the liability of the individual defendants submitted to the jury. This the trial court failed and refused to do.

of all individuals for a common sum different from the sum of liability found as against International and Local” (p. 9), Pineapple is not complaining of this point but of the fact that the jury was never permitted to pass upon the common sum liability of the individual defendants found to have participated in the riot and the damages proximately resulting therefrom.

¹⁰The verdict form required the jury to strike out the name of any defendant against whom the jury did not intend to return a verdict. (Tr. 141.)

CONCLUSION

This Court has acknowledged the injustice of this case insofar as one or more of the union officers and agents escaped individual liability (p. 14). The injustice runs deeper than this, for under the jury's verdict in this case at least 60 individual defendants who jointly participated in the riot against Pineapple have been allowed to escape liability for their unlawful acts.

We submit that the unjust verdict exonerating the individuals resulted from the failure of the trial court to allow the jury to separately pass upon the joint liability of the individual defendants for their riotous activities and was further due to errors committed by the trial court in the actual instructions it gave to the jury with respect to the liability of the appellees, all of which errors (except the tying together of the liability of the unions and individuals) have not been met by this Court.

Accordingly, we respectfully submit that this Court should grant our petition for a rehearing to consider and decide Pineapple's specification of errors in this cause, which have never been directly met or answered.

Respectfully submitted,

KRAUSE, EVANS & LINDSAY
GUNTHER F. KRAUSE
DENNIS LINDSAY

Attorneys for Appellant and
Petitioner

CERTIFICATE OF COUNSEL

IT IS HEREBY CERTIFIED that in the judgment of the undersigned, the foregoing petition for a rehearing is well-founded, and is not interposed for delay.

Dated, Portland, Oregon,
December 22, 1955.

DENNIS LINDSAY,
Of Counsel for Appellant and
Petitioner

APPENDIX A

SPECIFICATION OF ERRORS

(Assigned on Appeal)

1. The District Court erred in failing to submit to the jury the issue of the common law liability of the individual appellees to Hapco as a result of their unlawful activities, separate and apart from any issues of their liability as co-conspirators with International and Local 8.

2. The District Court erred in refusing to give to the jury the following instructions requested by Hapco:

“If you find from a preponderance of the evidence that certain individual defendants on or about September 28, 1949, in a riotous and tumultuous manner entered upon the dock of the Port of The Dalles and thereby placed in fear the employess of the plaintiff or of the Port of The Dalles, or of any other employers who were engaged in business with the plaintiff with an object of intimidating said employees and inducing them to refuse to perform their services for the plaintiff and other employers, and you further find that plaintiff sustained damages as a proximate result of such activities of the defendants, then your verdict should be for the plaintiff and against such defendants who participated, in such amount as will reasonably compensate it for the damage to its business and property.” (Tr. 130)

* * *

“If you find from the preponderance of the evidence that on September 28, 1949, at about the hour of 2:00 p.m. certain individual defendants entered upon the dock of the Port of The Dalles and there in a loud, riotous and tumultuous manner assaulted certain employees of the plaintiff and damaged property and cargo belonging to the plaintiff and resisted the

police officers of the City of The Dalles, all of the individual defendants who participated in the raid upon the dock are liable for all of the injuries and damages inflicted by any of the rioters if any such damages or injuries were inflicted." (Tr. 130-131)

* * *

"In the assessment of damages against the various defendants, you should consider the date as of which the defendant or defendants commenced the activities herein complained of, bearing in mind plaintiff's claim that its damages were sustained during a period commencing September 26, 1949. Accordingly, if you find from a preponderance of the evidence that each of the defendants, as a result of a conspiracy, engaged in the activities herein complained of and that plaintiff's losses, if any, commenced as of September 28, 1949, then each of the defendants would be liable for all of the damages, if any, sustained on and after that date regardless of whether he or they participated in the unlawful activities subsequent to that date. On the other hand, if you find from a preponderance of the evidence that there was no conspiracy, then the defendants may only be held liable for such damages, if any, that plaintiff sustained as a result of the activities of such defendant or defendants, bearing in mind the instruction which I have given you as to responsibility for the damages resulting from the riot, if any.

"I further instruct you that the plaintiff Hawaiian Pineapple Company can make only one recovery of the damages, if any, awarded to it in this action, and that if you should find for the plaintiff against some of the defendants in one sum and against others of the defendants for another sum, the plaintiff would be only entitled to recover the larger sum awarded, and is not entitled to recover the total of the different sums awarded." (Tr. 133-134)

Hapco objected to the refusal of the District Court to give instructions that it was entitled to recover against the individual appellees, even if the Labor-Management Relations Act, 1947, was not involved in the action, because of the wrongful physical activities engaged in by the individual appellees in preventing Hapco from carrying on its business operations (Tr. 1450-1451).

3. The District Court erred in giving the following instructions to the jury:

"Now, I want to mark that point. If you find under these instructions that I have just given you that neither of these unions is liable, neither the International nor the local, then you shall promptly enter a verdict in favor of all the defendants and against the plaintiff. That includes the individuals and everyone else. Now if you have, however, found liability under these instructions as to one or both unions, the International and local, then you may consider the liability of the individual defendants. In other words, you have to find the unions or one of them liable under the first part of the instructions before you can consider any individuals." (Tr. 1435)

* * *

"If you find from the evidence, that the individual defendants, [1726] among themselves or together with the Defendants International and Local 8, or either of the unions, conspired together to restrain trade and commerce between the Territory of Hawaii and any state of the United States, and to encourage or induce the employees of any employer by concerted action in the course of their employment to refuse to transport, handle or work upon a cargo of pineapple at The Dalles, Oregon, or to perform any services in connection therewith, with the object of forcing any employer or other person to cease doing business with any other person,

and with the purpose of doing injury to the business or property of the plaintiff, and that said damage to business or property was actually accomplished, then plaintiff is entitled to recover against any individuals who, knowing of the unlawful intent, did any act in furtherance thereof and reasonably calculated to effect the object of the conspiracy." (Tr. 1436-1437)

* * *

"If you find there was no conspiracy involving any individual defendants, then your deliberations will be confined to the defendant unions alone in accordance with the [1728] previous instructions. If as to any individual defendant you find he was not a member of such conspiracy or did no act in furtherance of any conspiracy, knowing of the common design and with the purpose of aiding and abetting the common object, then you should find in favor of that defendant." (Tr. 1438-1439)

* * *

"If you find that the International, acting through its agents or officers, in the course of their employment, or through Local 8 and Local 8 itself, through its officers and [1729] agents or members, in the course of their employment, induced or encouraged employes of any employer to engage in a concerted refusal in the course of their employment to transport or otherwise handle any goods, articles or commodities, or otherwise handle, work on or perform services in connection with any goods, if one of the objects of the inducement and encouragement was to force or require any person to cease doing business with any other person, and as a direct result plaintiff was injured in business or property, then you may find liability against both the union defendants.

If you find only one is so liable, then you will find liability against such defendant.

If you do not so find, you will return a verdict for all defendants and against the plaintiff.

But if you find one of the defendant unions liable, or both of the defendant unions liable, and if on further consideration you find that the defendant union or unions against whom you have found liability further entered into a conspiracy, as above described, with the individual defendants, you will add to the verdict the names of all the individual defendants against whom you find." (Tr. 1439-1440).

Hapco objected to these instructions to the effect that there could be no verdict against the individual appellees unless the unions were also found liable, on the ground that the cause of action against the individual appellees was broader than a conspiracy to restrain trade and was directed against and included the riot and the other activities the individual appellees engaged in to physically stop Hapco's business operations (Tr. 1450).

**In The United States
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For the Ninth Circuit**

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ALYCE KINTNER,
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OF MONTANA

BRIEF FOR THE UNITED STATES

H. BRIAN HOLLAND,
Assistant Attorney General.

ELLIS N. SLACK,
HARRY BAUM,
*Special Assistants
to the Attorney General.*

DALTON PIERSON,
United States Attorney.

R. LEWIS BROWN, JR.,
Assistant United States Attorney.

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No. 13,731

**In The United States
Court of Appeals**

For the Ninth Circuit

UNITED STATES OF AMERICA,
Appellant,

v.

ARTHUR R. KINTNER and
ALYCE KINTNER,

Appellees.

ON APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE DISTRICT
OF MONTANA

BRIEF FOR THE UNITED STATES

OPINION BELOW

The memorandum opinion of the District Court (R. 61-71) is reported at 107 F. Supp. 976.

JURISDICTION

This appeal involves federal income taxes for the year 1948 in the total amount of \$780.13 plus interest. The taxes in controversy were paid to the Collector of Internal Revenue for the District of Montana on September 11, 1950. (R. 72.) On or about September 20, 1950, taxpayers filed a claim for refund, and after the expiration of six months from the date of filing of such claim and

within the statutory period of limitations (Section 3772(a) of the Internal Revenue Code), taxpayers instituted this suit for refund in the District Court of the United States for the District of Montana. (R. 73.) Jurisdiction was conferred on the District Court by 28 U. S. C., Sec. 1340. Judgment was entered for the plaintiffs on October 9, 1952. (R. 83-84.) Within sixty days and on December 5, 1952, a notice of appeal was filed. (R. 84.) The jurisdiction of this Court is invoked under 28 U. S. C., Sec. 1291.

QUESTIONS PRESENTED

1. Whether the taxpayer,¹ a doctor practicing medicine as a member of an "unincorporated Association," is taxable on his full proportionate share of the net earnings derived by the Association from the medical services rendered by the member-doctors, including the share of net earnings for the taxable year set aside as a "reserve" by the Association for future expenses.

The answer depends on whether the Association is to be treated for federal income tax purposes as a corporation and its members as shareholders, as the District Court held, or as a partnership composed of the doctor-members, as the Government contends.

2. Whether an amount contributed by the Association to a pension trust for the benefit of the taxpayer as an "employee" of the Association is taxable to him in the year in which the contribution was made.

¹ Alyce Kintner, taxpayer's wife, is a party because joint returns were filed. (R. 72.) For convenience future references will be made only to the husband, as the "taxpayer."

(a) If the Association constitutes a partnership for tax purposes (as contended by the Government) then the contribution concededly is taxable to the taxpayer as part of his share of the partnership net earnings.

(b) If the Association is deemed a corporation of which the member-doctors are shareholder-employees (as the District Court held) the includibility of the contribution in taxpayer's income for the taxable year depends upon the answer to the following question:

Whether the pension plan meets the exemption requirements of Section 165(a) of the Internal Revenue Code.

STATUTE AND REGULATIONS INVOLVED

These appear in the Appendix, *infra*.

STATEMENT

The facts as found by the District Court (R. 61-63, 72-80) may be summarized as follows:²

The taxpayer is a medical doctor practicing his profession in Missoula, Montana. For many years prior to June 30, 1948, he was a member of a co-partnership which practiced medicine under the firm name of Western Montana Clinic. On that day the partners dissolved the partnership and executed "Articles of Association" whereby they purported to become members of an unincorporated association (hereafter referred to as the "Association") for the practice of medicine under the same

² The "Findings of Fact" (R. 72-80) are a replica of the findings as proposed by the plaintiffs below, and embody numerous conclusions of law. Only their factual content is summarized in the statement.

name. The assets and liabilities of the predecessor partnership were taken over by the Association, which thereafter carried on the same activities previously carried on by the partnership. All but two of the employees of the predecessor partnership became employees of the Association. (R. 62, 73-75.)

The Articles of Association (R. 12-28), incorporated by reference in the District Court's findings (R. 74), provided that the members "associate themselves together for the practice of medicine and surgery as an unincorporated Association," which was to be endowed with the "attributes of a corporation" and to be "treated as a corporation for purposes of taxation." (R. 12-13.) The Association was to terminate upon the death of the last survivor of the original members. (R. 13.) The original "members" of the Association were the eight doctors who were the members of the predecessor partnership, and only physicians or surgeons duly licensed to practice medicine in Montana were eligible for admission to membership. (R. 14-15.) The affairs of the Association were to be managed by an executive committee composed of five of the members, who were to select officers, and any indebtedness incurred by the Association through the act of a member without authority conferred by the committee was chargeable against such member's share of the earnings of the Association. (R. 15-18.) Only the members were to be liable to third parties for professional misconduct. (R. 19.) They were to receive "salaries" fixed by the executive committee, the net earnings of the Association were to be divided among them "in proportion to the salaries of such Members," and "All

sums paid to Members, * * * by way of distribution of net earnings, shall be deemed to constitute compensation to the Members for services rendered during the year." (R. 19-20.) The Association was to collect the "accounts receivable for professional services rendered" by the members, was to furnish them with the equipment needed to render such services, and was to pay "all necessary expenses incident to the practice of medicine and surgery by its Members." (R. 21.) In lieu of receiving an interest in assets of the Association, each member agreed that upon his death or withdrawal he would accept the benefits of a pension plan the cost of which was to be borne by the Association (R. 23-25.) The death or retirement of a member was not to cause a dissolution of the Association (R. 26), and the interest of a member was "non-assignable" (R. 27).

The Association was formed by the former partners to enable some rather than all of them to manage its affairs, and to avoid the necessity of a reorganization of the partnership upon the death of a member. (R. 73-74.) Since its formation the Association has operated in accordance with the articles of association. Its affairs have been managed by an executive committee composed of some of the members, while officers chosen by the committee have handled minor details of management. Taxpayer was elected its president. The Association rented in its name space for use in the practice of medicine; employed the services of non-member doctors and other employees; collected in its name the fees earned for

medical services rendered by its members and other doctors employed by it; and paid them salaries and all their expenses in practicing their profession. It also paid social security and withholding taxes, for which purposes it included among its employees the member-doctors; and it paid federal corporate income taxes and state corporation license taxes. (R. 75-76.)

The Articles of Association provided for establishment of a pension plan for the benefit of "qualified employees," whereby those who had been "employed by the Association or its predecessor partnership for at least three years and have attained the age of at least thirty years, shall be entitled to retirement benefits." (R. 24.) Immediately upon its formation the Association entered into a pension trust agreement with a trustee-bank. (R. 78.) This agreement provided with respect to eligibility requirements that employees of the Association who were "employees or members" of the predecessor partnership "shall be given credit for such period of membership or employment by such predecessor." (R. 30.) All contributions under the pension plan are made by the Association, and none by the participants. (R. 78.)

During the portion of the tax year 1948 beginning on July 1, 1948, the Association had thirty-eight employees, including as "employees" the eight member-doctors who were the members of the predecessor partnership. Of these, twenty-four (not including the member doctors) were ineligible to participate under the terms of the pension plan by reason of the fact that they had been employed less than three years, and three others were inel-

igible because of the age requirements. Of the remaining eleven persons who participated in the plan, eight were the member doctors, and for purposes of determining whether they had been employed by the Association for at least three years the period during which they had been partners of the predecessor partnership was treated as a period of employment. Only three persons who were not members of the Association participated in the plan. (R. 79-80.)

The Association set up a "reserve" fund on its books during 1948, to cover anticipated operating expenses for future years; and if the Association is to be regarded for federal income tax purposes as a partnership rather than a corporation a share of this reserve amounting to \$1,140.82 is concededly includible in taxpayer's income for the tax year 1948. (R. 9-10, 62-63, 72-73.) The Association also made contributions to the pension trust during 1948, of which \$976.14 was paid for taxpayer's benefit. (R. 62, 72-73.) Taxpayer did not report either of these amounts in his 1948 tax returns, and the Commissioner added them to his income, resulting in a deficiency determination. Taxpayer paid the deficiency, and after his claim for refund was not acted upon instituted this suit for refund. (R. 72-73.)

The District Court held that the Association was to be treated for federal income tax purposes as a corporation rather than a partnership, and hence that taxpayer's share of the reserve fund set aside by the Association was not taxable to him. It further held that the pension trust met the exemption requirements of Section 165(a)

of the Internal Revenue Code, and hence that taxpayer was not taxable on the amount paid to the trust by the Association on his behalf. (R. 63-71, 80-83.) It accordingly entered judgment for the taxpayer. (R. 83-84.)

STATEMENT OF POINTS TO BE URGED

The District Court erred:

1. In holding that an unincorporated Association formed by a group of doctors for the purpose of practicing medicine is to be regarded for federal income tax purposes as if it were a corporation, rather than as a partnership composed of the doctor-members of the Association.

2. In holding that the pension plan adopted by the Association for the benefit of its eight doctor-members and three employees satisfied the exemption requirements of Section 165(a) of the Internal Revenue Code.

SUMMARY OF ARGUMENT

I.

Taxpayer's status as a member of an unincorporated Association formed to practice medicine is no different for federal income tax purposes than it was as a member of the predecessor medical partnership, and he is taxable on his full share of the net earnings of the Association. Granting as the court below held that the Association was endowed with more of the formal attributes of a corporation than of a partnership, it cannot be regarded for tax purposes as if it were a corporation because the activity in which it purported to engage—the practice of medicine—was not one which could lawfully be carried on by an artificial corporate entity. The federal taxing statute, while not to be circumscribed by local law definitions of partnerships and corporations, does not treat as a corporation an unincorporated organization which is prohibited from incorporating. Furthermore, the net earnings of the Association were derived solely from, and were distributable solely as compensation for, the professional services of the member-doctors, features which render the Association and its members fundamentally different from a corporation and its shareholders.

If (as the Government contends) the Association is a medical partnership for tax purposes, then its pension plan clearly was not for the exclusive benefit of its "employees," as required by Section 165(a) of the Internal Revenue Code, since the plan benefited the employer-partners. But even assuming that the Association must be regarded as a

corporation of which the member-doctors are the shareholders (as the court below held), taxpayer has failed to show that the pension trust meets the several exemption requirements of Section 165(a), and he is therefore taxable on the amount contributed by the Association to the trust on his behalf. Out of thirty-eight employees of the Association (including the eight shareholder-doctors as "employees"), eleven were benefited by the plan, and eight of the eleven were the shareholder-doctors. In holding that the percentage requirements of Section 165(a)(3)(A) were met (and that consequently the alternative non-discrimination requirements of Section 165(a)(3)(B) need not be considered), the court below erroneously treated the eight shareholder-doctors as having been employed by the predecessor partnership while they were its members, and hence as falling within the terms of the plan conditioning eligibility upon at least three years' employment. The error of the court below is compounded by its general "findings" that the plan complies with the other requirements of Section 165(a). Even assuming that the plan satisfies paragraph (3) of Section 165(a), taxpayer still cannot prevail because he has failed to show compliance with the separate and coordinate requirements of paragraphs (2) and (4) of that section.

ARGUMENT

I.

TAXPAYER IS TAXABLE ON HIS SHARE
OF THE NET EARNINGS OF THE MEDICAL
ASSOCIATION IN THE SAME MANNER
AS WHEN HE WAS A MEMBER OF
THE PREDECESSOR MEDICAL PART-
NERSHIP

Taxpayer, a doctor, practiced his profession in partnership with other doctors until June 30, 1948. (R. 74-75.) On that date, he and his partners entered into an agreement to "associate themselves together for the practice of medicine and surgery as an unincorporated Association which * * * shall be treated as a corporation for purposes of taxation." (R. 12-13.)

The initial question presented is whether taxpayer's proportionate share of a so-called reserve set aside by the Association from its 1948 net earnings is includible in his gross income for that year. Taxpayer's distributive share of this reserve admittedly is taxable to him if the Association is to be regarded for federal income tax purposes as a partnership composed of the member-doctors. (R. 62, 72-73.) On the other hand, if the Association is to be regarded as a corporation and the member-doctors as its shareholders, then this reserve is not taxable to taxpayer unless and until it is distributed to him as a dividend.³ The District Court concluded that the Asso-

³ Partnerships are not taxable entities; each partner must include in his individual income his share of partnership net income, whether or not distribution is made to him. Sections 181-187 of the Internal Revenue Code. Corporate earnings are taxable to the shareholders in the year distributed. Section 115(a) of the Internal Revenue Code; Section 29.115-1 of Treasury Regulations 111.

ciation is to be treated as a corporation for tax purposes (R. 63-68), and we submit that its decision is clearly erroneous.

The artificial entity known as a "corporation," although a creature of state law, is recognized for federal income tax purposes as a taxable entity. Internal Revenue Code, Sections 13, 52 (26 U. S. C. 1946 ed., Secs. 13, 52). Moreover, as used in the federal taxing statute the term "corporation" embraces not only business organizations which elect to incorporate under the local law, but unincorporated "associations" which possess the salient characteristics of a corporation. Section 3797(a)(3) of the Internal Revenue Code (Appendix, *infra*); Sections 29.3797-1 and 29.3797-2 of Treasury Regulations 111 (Appendix, *infra*). The taxation of associations in the same manner as conventional corporations is based upon the "resemblance" of the nature and activities of the two organizations. *Morrissey v. Commissioner*, 296 U. S. 344, 357. An unincorporated association which lacks such resemblance is a "partnership" for tax purposes. Section 3797(a)(2) of the Internal Revenue Code (Appendix, *infra*); Section 29.3797-4 of Treasury Regulations 111, (Appendix, *infra*). *Commissioner v. Gerstle*, 95 F. 2d 587 (C. A. 9th); *Commissioner v. Rector & Davidson*, 111 F. 2d 332 (C. A. 5th), certiorari denied, 311 U. S. 672.

Applying the resemblance test laid down in the *Morrissey* case, *supra*, the District judge here concluded that as "between a corporation and a partnership, the association most closely resembles a corporation." (R. 68.) There

could be no quarrel with this conclusion *if* (as in the *Morrissey* and similar cases relied upon by taxpayer) the income-producing activity of the Association were of a kind which might have been carried on by a corporation. The basic fallacy in the District Court's reasoning lies in its assumption that an unincorporated association organized and operated solely "for the practice of medicine and surgery" (R. 12)—an activity which could not be carried on through a corporation even if its members wished to incorporate—may sufficiently resemble a corporation to be taxable as such. As a general rule, the practice of medicine by a corporation is prohibited; neither a corporation nor any other unlicensed entity may engage, through licensed employees, in the practice of medicine or surgery. 41 American Jurisprudence, Physicians and Surgeons, Sec. 20. See *People v. United Medical Service*, 362 Ill. 442, 200 N. E. 157. The laws of Montana, where the instant Association purported to practice medicine, list the purposes for which a corporation may be formed and such purposes do not include the practice of medicine. Montana Civil Code (1935), Sec. 5903. Since taxpayer and his erstwhile partners were prohibited from practicing medicine as shareholders of a corporation, the unincorporated Association of which they constituted themselves the members may not be regarded as a "corporation" for tax purposes merely because it was endowed with some of the formal features of a corporation, such as centralized management and continuity of existence. An unincorporated organization which is prohibited by law from carrying

on its activities as a corporation can never bear the requisite substantial "resemblance" (*Morrissey v. Commissioner supra*, p. 357) to a corporation demanded by the taxing statute, regardless of the number of corporate garments in which it is clothed.

To be sure, the Treasury Regulations state (Section 29.3797-1 of Regulations 111) that the Internal Revenue Code makes its "own classification" of taxable entities, and that "Local law is of no importance in this connection." This obviously does not mean, however, that the federal taxing statute displaces local law for purposes of determining what kind of an organization may be incorporated, for the very right of existence of a corporation is dependent upon local law. All that the regulation can and does mean is that local law is not determinative of whether a business which could be—but is not—incorporated is to be treated for tax purposes as if it were a corporation. The "classification" of an association as a corporation which the Internal Revenue Code makes for tax purposes necessarily presupposes a freedom of election on the part of those associating themselves as to the form of group action to be taken. Nothing in the Internal Revenue Code or the Treasury Regulations may fairly be construed as creating for tax purposes an artificial entity which could not legally be created for other purposes. Since the doctors who here associated themselves as members of the Association were prohibited from likewise associating themselves as shareholders of a corporation, the court below improperly overruled the Commissioner's determination that the Association could not be treated for tax purposes as if it were a corporation.

Quite apart from the fact that the purpose for which the Association was formed was one for which it could not lawfully be incorporated, the Association differs fundamentally from a corporation in that it carries on no "business" as that term is generally understood. A corporation is a business enterprise whose earnings are derived from a combination of capital and labor, and whose net profits are distributable to those who invest the capital. Here the profits of the Association are not derived from a business, i. e., a combination of capital and labor, but solely from professional services.⁴ The only capital of the Association consists of the tools and equipment needed by the member-doctors in their rendition of medical services. (R. 21, 75.)

Nor do member-doctors of the Association bear any resemblance to the shareholders of a corporation. Their interest consists solely of a right to receive a portion of the income derived from their collective personal services in carrying on their profession. Thus Article XII of the Articles of Association provides that the net earnings of the Association are to be distributed among the doctor-members in proportion to the salaries fixed for their services and that "All sums paid to Members, * * * by way of distribution of net earnings, shall be deemed to constitute compensation to the Members for services rendered during the year." (R. 20.) Other provisions of the Articles emphasize the dissimilarity between the interest of the member-doctors and that of a shareholder of a

⁴ Section 22(a) of the Internal Revenue Code (Appendix, *infra* which defines gross income, refers separately to income from "professions" and from "businesses."

corporation. Whereas the shareholder of a corporation becomes such simply by contributing capital, only licensed doctors may become members of the Association. (Article V, R. 14-15.) Whereas the interest of a shareholder of a corporation is assignable, the interests of the member-doctors are non-assignable. (Article XXVI, R. 27); indeed, upon the death or retirement of a member, he ceases to have any interest in the assets of the Association and is entitled only to pension benefits (Article XXI, R. 23-24.⁵) Whereas a corporation is liable for the acts of its agents, the Association is not to incur liability for unethical acts of member-doctors performed in its behalf. (Article XI, R. 19.) And whereas the life of a corporation does not depend upon the life of its shareholders, the Association is to terminate upon the death of the last survivor of the original members. (Article III, R. 13.)

In substance and effect the Association was but a continuation of the predecessor partnership. The practice of medicine was carried on by the members of the Association in substantially the same manner as it had been carried on by them as members of the partnership. (R. 165-174.) True, after the Association was formed an "Executive Committee" of five of the eight members managed their affairs, instead of the eight members as was the case when they were partners; and the Association was to con-

⁵ While "certificate notes" were issued to the members in exchange for their interests in the predecessor partnership (R. 74), no property was realizable on account of such notes. The court below found (R. 76) that "the capital structure of the Association is unique in that none of the members of the Clinic, either senior or junior, have any presently realizable ownership in the property of the Association."

tinue until the death of the last surviving member, while under the partnership the death of any member would have required formation of a new partnership by the survivors. However, these differences hardly suffice to transform what for tax purposes concededly was a partnership composed of individual doctors into an artificial entity practicing medicine and taxable as a corporation. The Association no more practiced medicine as an entity separate and apart from its doctor-members than did the predecessor partnership. Its net income was but the collective net income of the group of doctors who jointly practiced medicine as its members. The Association collected the fees for the "professional services rendered," out of which it purchased the necessary medical instruments and paid "all necessary expenses incident to the practice of medicine and surgery by its Members." (R. 21.) The balance (net earnings) was distributable to the member-doctors by way of "compensation." (R. 20.) That the members agreed among themselves to permit the Association to withhold a portion of their net compensation as a "reserve" (R. 20) does not relieve them of tax on this portion. Formation of the Association no more served to insulate them from tax liability on their entire net earnings for each taxable year than did formation of the predecessor corporation.

The Government's position on the question here presented has been the same since 1938, when its contrary position was rejected by the Court of Appeals in *Mobile Bar Pilots Ass'n v. Commissioner*, 97 F. 2d 695 (C. A.

5th).⁶ It was there held that an association of pilots could not be classified as a corporation for tax purposes notwithstanding that it possessed most of the features of a corporation, including centralized management and continuity of existence uninterrupted by death or withdrawal of a member. Relying upon the *Morrissey* and like cases, the Commissioner contended that the organization was an association taxable as a corporation, and the Board of Tax Appeals (now the Tax Court) sustained him. However, the Court of Appeals reversed, stating (pp. 696-697):

We do not consider these and similar cases in point for the following reasons.

Pilotage is the performance of personal services requiring the pilot to have the highest degree of skill as a seaman and is controlled by law. Under the law of Alabama, Gen. Acts 81 and 611 Reg. Sess. 1931, pp. 154, 756, before a man can be licensed as a pilot at the port of Mobile he must have a license * * * He must pass an examination before the Alabama Commission to establish his fitness and be an American citizen of good character. * * * For one not licensed to act as a pilot is a punishable offense.

It is not necessary for a man to be a member of an association to practice his profession but in the nature of things it would be impossible for him to operate alone. * * *

⁶ An earlier decision in *Pelton v. Commissioner*, 82 F. 2d 473 (C. A. 7th), sustaining the Commissioner's contention that an association of doctors was taxable as a corporation, has not been followed since the *Mobile* decision, which was published by the Commissioner in 1939-2 Cum. Bull. 244. The *Pelton* case was not relied upon by the court below, and in any event is distinguishable from this one in several respects. For example, not all of the income of the association involved in the *Pelton* case was derived from the professional services of its members, part of it being derived from business activities; moreover, the association possessed important corporate features absent here, such as transferability of the interests of the members.

It is necessary for the pilots to have someone to look after their business affairs such as collecting their fees as it would be impracticable for the pilot to do that personally.

Pilotage is personal service by an individual * * *. But an association of which the pilot is a member, similar to petitioner, is not responsible for his acts. *Guy v. Donald*, 203 U. S. 399, 27 S. Ct. 63, 51 L. Ed. 245.

It would be impossible for petitioner to engage in the business of piloting as an independent contractor. Petitioner does no business except as an agent of its individual members. It owns no property and has no income as an entity. Consequently is not required to pay income taxes as an association. If by mistake it has filed an income tax return estoppel does not result therefrom and it is immaterial what deductions it attempts to take from the income reported. It follows that it was error for the Board to hold that petitioner was engaged in the business of furnishing licensed pilots and is an association taxable as a corporation.

The situation of the doctors who formed the Association here under consideration is analogous to that of the pilots who formed the association involved in the *Mobile* case, and the rationale of the decision in that case applies with full force here. The practice of a profession such as medicine or law is an individual matter. There is nothing to prevent doctors from associating themselves as individuals in the practice of medicine, as taxpayer here did when he associated himself in partnership with other doctors. But there can be no practice of medicine by an

unlicensed artificial entity.⁷ Taxpayer's status as a member of the Association was, in substance and taxwise, no different from what it was as a member of the predecessor partnership.

II.

THE PENSION TRUST CREATED BY THE ASSOCIATION DOES NOT MEET THE EXEMPTION REQUIREMENTS OF SECTION 165(a) OF THE INTERNAL REVENUE CODE

Section 165 of the Internal Revenue Code deals with the tax liability of an employees' trust and of the employee-beneficiaries.⁸ Section 165(a) (Appendix, *infra*) prescribes the conditions under which the trust is exempt from tax. If the trust meets the several requirements of that section, then under Section 165(b) (Appendix, *infra*), the beneficiary is taxable on the amounts distributed by the trust in the years of distribution, in the same manner as an annuity. If the trust does not meet the exemption requirements of Section 165(a), then under Section 165(c) (Appendix, *infra*) the beneficiary is taxable on the employer's contributions to the trust in the years in which the contributions are made, where the employee's interest is nonforfeitable.

⁷ A corporation or association may of course employ doctors in carrying on permissible activities without engaging in the practice of medicine. For example, a corporation whose members are the public (not the doctors) and which procures for them medical services and hospitalization on a risk-sharing prepayment basis is engaged in a business, not the practice of a profession. See *American Medical Assn. v. United States*, 317 U. S. 519, 528.

⁸ Complementary Section 23(p) deals with the deductibility by the employer of amounts contributed to an employees' trust.

Upon its formation the "Association" established a pension trust in which the eight doctor-members (including taxpayer) and three employees were permitted to participate. (R. 78-80.) The amount contributed by the Association in 1948 on taxpayer's behalf was not reported by him as income in that year, on the theory that the trust met the requirements of Section 165(a). (R. 62-63.) The Commissioner determined that the plan did not satisfy these requirements, and the District Judge overruled his determination. (R. 69-71, 82.)

A. *If the Association is a partnership, the plan is not for the exclusive benefit of its "employees" within the meaning of Section 165(a) since the employer-partners are beneficiaries*

If this Court agrees with our contention (point I, *supra*) that the Association must be regarded for tax purposes as a partnership rather than a corporation, then there is no need to reach and determine the question of whether the pension trust meets the requirements of the various subsections of Section 165(a). In such case the trust would fail to satisfy the opening requirement of Section 165(a) that the employer's plan be "for the exclusive benefit of his employees or their beneficiaries," since it admittedly would benefit the employer-partners as well as the employees of the partnership. I. T. 3350, 1940-1 Cum. Bull. 64. This long-standing administrative ruling, after reviewing the applicable statutory provisions and Regulations, states (p. 65):

From the foregoing, it appears that such professional partnerships are entitled to the same privileges

as corporations in the establishment of pension trusts for the benefit of the *bona fide* employees of the partnerships. However, it is the view of the Bureau that a general partner, as such, is not an employee of the partnership and is precluded, under the provisions of section 165 of the Internal Revenue Code, as amended, from participating in the benefits of a trust such as is contemplated by that section and by similar provisions of prior Revenue Acts.

B. *Even if the Association is deemed a corporation, the plan fails to satisfy the requirements of Section 165(a)*

Even assuming arguendo that the Association must be regarded as a corporation and the doctor-members as its shareholders, taxpayer still cannot prevail since he has failed to show that the plan meets the requirements of subsections (2), (3) and (4) of Section 165(a).⁹ Although the court below held that the plan "complies with all the requirements of Section 165(a)" (R. 71), it dealt only with subsection (3) in its opinion (R. 69-70), Accordingly, we shall deal first with this subsection.

1. *The requirements of Section 165(a)(3) are not met*

Subsection (3) of Section 165(a) prescribes certain coverage and classification requirements, and paragraphs (A) and (B) of this subsection provide alternative methods for meeting them. To qualify under paragraph (B)

⁹ An action on a claim for refund to recover taxes erroneously collected is essentially an equitable action for money had and received and unjustly retained by the United States, and it is incumbent upon the claimant to prove all the elements entitling him to recovery including the amount of overpayment. *Stone v. White*, 301 U. S. 532; *Lewis v. Reynolds*, 284 U. S. 281.

it must be shown that the plan “benefits * * * such employees as qualify under a classification set up by the employer and found by the Commissioner not to be discriminatory.” No claim has been made by taxpayer that the plan qualifies under paragraph (B), nor would any such claim be tenable since the plan was never approved by the Commissioner. See *Charles E. Smith & Sons Co. v. Commissioner*, 184 F. 2d 1011, 1014 (C. A. 6th), certiorari denied, 340 U. S. 953. Section 29.165-1(c) of Treasury Regulations 111. However, the court below agreed with taxpayer’s contention that the plan met the alternative requirements of paragraph (A), and accordingly held that “there is no occasion to consider the plan with reference to subsection (3)(B).” (R. 70.) We respectfully submit that the court below clearly erred in holding that the provisions of paragraph (A) were satisfied.

A plan qualifies under paragraph (A) if it “benefits * * * 70 per centum or more of all the employees, or 80 per centum or more of all the employees who are eligible to benefit under the plan if 70 per centum or more of all the employees are eligible to benefit under the plan, *excluding in each case employees who have been employed not more than a minimum period prescribed by the plan, not exceeding five years.*” (Italics supplied.) The agreement creating the “Association” authorized it to establish a pension plan “whereby all employees of the Association who have been *employed by the Association or its predecessor partnership for at least three years* and have attained

the age of at least thirty years, shall be entitled to retirement benefits" upon reaching age sixty-five. (*Italics supplied*; R. 24.)¹⁰ Thus in applying the percentage requirements of Section 165(a)(3)(A), employees of the Association who had been "employed" by it or by the predecessor partnership for less than three years must be excluded from consideration.

The District Court found that the Association had a total of thirty-eight employees, including the eight members as "employees"; that of this total, twenty-four (not including the eight members) were ineligible to participate in the plan because they had been employed less than three years; that of the remaining fourteen employees, three were ineligible because of the age requirements; and that the remaining eleven employees—consisting of the eight members of the Association and three non-members—were eligible to and did participate in the plan. On the basis of these findings, it concluded that eleven out of fourteen, or seventy percent of "all" the employees, "excluding those employees who had been employed less than three (3) years," were eligible to participate, and that all those eligible did participate. (R. 79-80.)

In applying the percentage requirements of Section 165(a)(3)(A), the court below properly excluded the twenty-four persons who had not been "employed" by the Association or the predecessor partnership for at least three years. However, it *erroneously omitted also to ex-*

¹⁰ The plan as adopted departed from the eligibility requirements authorized in the Articles of Association by providing that employees of the Association who were "members" of the predecessor partnership "shall be given credit for such period of membership." (R. 30.)

clude the eight members of the Association who likewise had not been "employed" for at least three years. The period during which the members of the Association were employer-members of the predecessor partnership may not be counted as part of a period during which they were "employed", particularly since the Articles of Association themselves explicitly provide that only those employees of the Association who had been "employed by the Association or its predecessor partnership" for at least three years were eligible to participate. (R. 24.) If the eight members of the Association who were the employer-members of the predecessor partnership are excluded for purposes of applying the percentage requirements of Section 165(a)(3)(A), as they must be, then it is clear that the plan does not qualify. The Association had a total of thirty-eight employees, of whom thirty-two (including the eight member-employees) had less than three years service as *employees* of the Association or the predecessor partnership. The percentage requirement of Section 165(a)(3)(A) is therefore applicable to the remaining six employees.¹¹ Since three of these were ineligible to participate because of age requirements (R. 79), only fifty percent of the employees were eligible to benefit under the plan and the percentage requirements has not been met.¹²

2. The requirements of Section 165(a)(2) are not met

¹¹ The District Judge found this number to be fourteen (R. 79), since his computation failed to exclude the eight members.

¹² While all (one hundred percent) of the three employees who were eligible did participate, at least seventy percent of all the employees must be eligible under Section 165(a)(3)(A).

The error of the court below is accentuated by its general "finding" that the plan meets the requirements of subsection (2) of Section 165(a). (Finding XII(b), R. 19.)¹³ This subsection specifies that it must be "impossible" under the terms of the trust created by the employer "for any part of the corpus or income to be * * * used for, or diverted to, purposes other than for the exclusive benefit of his employees." A trust instrument which permits the employer even indirectly to control either the investment or the disposition of the trust funds runs afoul of this provision. *Lichter v. Commissioner*, 201 F. 2d 49 (C. A. 6th), certiorari denied, 345 U. S. 942; *Charles E. Smith & Sons Co. v. Commissioner*, *supra*, p. 1014; Section 29.165-2 of Treasury Regulations 111. See also *South Texas Commercial Nat. Bank of Houston v. Commissioner*, 162 F. 2d 462 (C. A. 5th), certiorari denied, 332 U. S. 772; *Roberts Filter Mfg. Co. v. Commissioner*, 174 F. 2d 79 (C. A. 3d); *Robertson v. Steele's Mills*, 172 F. 2d 817 (C. A. 4th). It was no less possible in this case for the employer to divert the trust funds to purposes other than the "exclusive benefit of his employees, through control of the administration of the trust, than in the *Lichter* and *Smith Co.* cases, *supra*.

The trust instrument here provided that the trust was to be administered by a "Pension Committee" of three members, who were to be appointed by and hold office "during the pleasure" of the executive committee of the employer-Association. (R. 42.) This employer-controlled

¹³ This finding embodies the statutory language of Section 165(a)(2), without mentioning the section, and represents a legal conclusion.

pension committee was to "supervise and control the operation" of the plan, and was to have unlimited power to construe the trust instrument and determine all questions affecting eligibility of any employee. (R. 42-43.) Moreover, the trustee could make no investments or disbursements except those authorized by the employer-controlled pension committee. (R. 43, 45.)¹⁴ The trustee could be removed at any time upon notice by the employer (R. 46); and it was to be liable "only for the safekeeping" of documents and to have "no other or further duties" (R. 43). These features alone preclude qualification of the trust under Section 165(a)(2). In the *Smith & Sons Co.* case, *supra*, p. 1014, the court held that a pension trust was not "for the exclusive benefit" of the employees within the meaning of that section because one of the three trustees was the president and stockholder of the employer-corporation. The court said (p. 1014) that "As one of the three trustees administering the trust, the two other trustees being employees, he was in sole control not only of the corporation, but of the trust." In the *Lichter* case, *supra*, the court likewise held that the trust did not qualify under Section 165(a)(2) because an advisory board consisting of three members appointed by the employer controlled the acts of the trustees. The instant case presents an *a fortiori* situation for holding that the trust did not qualify under Section 165(a) as one under which it was "impossible" for any part of the trust fund to be used for purposes other than the "exclusive benefit" of the employees.

¹⁴ Neither the pension committee, the trustee, nor the employer was to be held responsible for the investments selected. (R. 38-39, 43, 44-45, 47-48.)

3. *The requirements of Section 165(a)(4) are not met*

Equally unfounded is the general "finding" by the court below that the plan meets the requirements of subsection (4) of Section 165(a). (Finding XII(d), R. 80.)¹⁵ Under this portion of Section 165(a), it must be shown that the "benefits provided under the plan do not discriminate in favor of employees who are officers, shareholders * * *." If as the court below held the Association is to be treated as a corporation, then the eight doctor-members are in effect its "shareholders," and the conclusion is inescapable that the plan discriminated in their favor. The plan as adopted authorized crediting the shareholders as *employees* of the Association with the period during which they were employer-partners in the predecessor partnership (R. 30), so as to make them immediately eligible for participation in the plan as "employees" having at least three years' service. As a consequence, contributions were made by the Association on behalf of the shareholder-employees for at least three years prior to the date contributions would have been made had they been subject to the same standards of eligibility that existing and future non-shareholder employees were required to meet.

The pension provided by the plan is "a monthly pension amounting to one and one-half per cent (1½%) of the monthly salary of the employee for each year of service of such employee (not to exceed thirty years' service) be-

¹⁵ This finding embodies the statutory language of Section 165(a)(4), without mentioning the section, and like finding XII(b) represents a legal conclusion.

tween the date of first participation by the employee and the employee's retirement date." (R. 33.) By permitting the shareholder-employees to participate three years prior to the date they could meet the standards applicable to non-shareholder employees, the plan discriminated in favor of the shareholders by according each of them a pension at least four and one-half percent greater than that accorded other employees having the same number of years of service and the same salary. This discriminatory feature of the plan becomes even more pronounced when it is remembered that only eleven out of thirty-eight employees were allowed to participate immediately, and that eight of these eleven participants were the shareholders. (R. 79-80.) Cf. *Charles E. Smith & Sons Co. v. Commissioner*, *supra*, p. 1014.

In short, even if the Association is deemed to be a corporation rather than a partnership for tax purposes, and the doctor-members are regarded as shareholders rather than as partners, it was error for the court below to hold (R. 71) that the pension plan of the Association "complies with all the requirements of Section 165(a)." The plan failed to comply with the requirements of subsections (2), (3) and (4) of that section.

CONCLUSION

The decision of the District Court is erroneous and should be reversed.

Respectfully submitted,
H. BRIAN HOLLAND,
Assistant Attorney General.

ELLIS N. SLACK,
HARRY BAUM,
*Special Assistants to the
Attorney General.*

DALTON PIERSON,
United States Attorney.

R. LEWIS BROWN, JR.,
Assistant United States Attorney.

JULY, 1953

APPENDIX

Internal Revenue Code:

SEC. 22. GROSS INCOME.

(a) *General Definition.*—"Gross income" includes gains, profits, and income derived from salaries, wages, or compensation for personal service * * *, of whatever kind and in whatever form paid, or from professions, vocations, trades, businesses, commerce, or sales, or dealings in property, whether real or personal, growing out of the ownership or use of or interest in such property; also from interest, rent, dividends, securities, or the transaction of any business carried on for gain or profit, or gains or profits and income derived from any source whatever.
* * *

* * * * *

(26 U. S. C. 1946 ed., Sec. 22.)

SEC. 165 [As amended by Sec. 162(a), Revenue Act of 1942, c. 619, 56 Stat. 798]. EMPLOYEES' TRUSTS.

(a) *Exemption from Tax.*—A trust forming part of a stock bonus, pension, or profit-sharing plan of an employer for the exclusive benefit of his employees or their beneficiaries shall not be taxable under this supplement and no other provision of this supplement shall apply with respect to such trust or to its beneficiary—

(1) if contributions are made to the trust by such employer, or employees, or both, for the purpose of distributing to such employees or their beneficiaries the corpus and income of the fund accumulated by the trust in accordance with such plan;

(2) if under the trust instrument it is impossible, at any time prior to the satisfaction of all liabilities with respect to employees and their beneficiaries under the trust, for any part of the corpus

or income to be (within the taxable year or thereafter) used for, or diverted to, purposes other than for the exclusive benefit of his employees or their beneficiaries;

(3) if the trust, or two or more trusts, or the trust or trusts and annuity plan or plans are designated by the employer as constituting parts of a plan intended to qualify under this subsection which benefits either—

(A) 70 per centum or more of all the employees, or 80 per centum or more of all the employees who are eligible to benefit under the plan if 70 per centum or more of all the employees are eligible to benefit under the plan, excluding in each case employees who have been employed not more than a minimum period prescribed by the plan, not exceeding five years, employees whose customary employment is for not more than twenty hours in any one week, and employees whose customary employment is for not more than five months in any calendar year, or

(B) such employees as qualify under a classification set up by the employer and found by the Commissioner not to be discriminatory in favor of employees who are officers, shareholders, persons whose principal duties consist in supervising the work of other employees, or highly compensated employees;

and

(4) if the contributions or benefits provided under the plan do not discriminate in favor of employees who are officers, shareholders, persons whose principal duties consist in supervising the work of other employees, or highly compensated employees.

* * *

(b) *Taxability of Beneficiary*.—The amount actually distributed or made available to any distributee by any such trust shall be taxable to him, in the year in which so distributed or made available, under section 22(b)(2) as if it were an annuity the consideration for which is the amount contributed by the employee, except that if the total distributions payable with respect to any employee are paid to the distributee within one taxable year of the distributee on account of the employee's separation from the service, the amount of such distribution to the extent exceeding the amounts contributed by the employee, shall be considered a gain from the sale or exchange of a capital asset held for more than 6 months.

(c) *Treatment of Beneficiary of Trust Not Exempt Under Subsection (a)*.—Contributions to a trust made by an employer during a taxable year of the employer which ends within or with a taxable year of the trust for which the trust is not exempt under section 165(a) shall be included in the gross income of an employee for the taxable year in which the contribution is made to the trust in the case of an employee whose beneficial interest in such contribution is nonforfeitable at the time the contribution is made.

(26 U. S. C. 1946 ed., Sec. 165.)

SEC. 3797. DEFINITIONS.

(a) When used in this title, where not otherwise distinctly expressed or manifestly incompatible with the intent thereof—

* * *

(2) *Partnership and Partner*.—The term “partnership” includes a syndicate, group, pool, joint venture, or other unincorporated organization, through or by some means of which any business, financial operation, or venture is carried on, and

which is not, within the meaning of this title, a trust or estate or a corporation; and the term "partner" includes a member in such a syndicate, group, pool, joint venture, or organization.

(3) *Corporation*.—The term "corporation" includes associations, joint-stock companies, and insurance companies.

* * *

(26 U. S. C. 1946 ed., Sec. 3797.)

Treasury Regulations 111, promulgated under the Internal Revenue Code:

Sec. 29.3797-1. *Classification of Taxables*.—For the purpose of taxation the Internal Revenue Code makes its own classification and prescribes its own standards of classification. Local law is of no importance in this connection. Thus, a trust may be classed as a trust or as an association (and, therefore, as a corporation), depending upon its nature or its activities. (See section 29.3797-3.) The term "partnership" is not limited to the common law meaning of partnership, but is broader in its scope and includes groups not commonly called partnerships. (See section 3797-4.) The term "corporation" is not limited to the artificial entity usually known as a corporation, but includes also an association, a trust classed as an association because of its nature or its activities, a joint-stock company, an insurance company and certain kinds of partnerships. (See sections 29.3797-2 and 29.3797-4.) The definitions, terms, and classifications, as set forth in section 3797, shall have the same respective meaning and scope in these regulations.

Sec. 29.3797-2 [as amended by T. D. 5468, 1945 Cum. Bull. 332.] *Association*.—The term "association" is not used in the Internal Revenue Code in any narrow or technical sense. It includes any organization, created for the transaction of designated affairs,

or the attainment of some object, which, like a corporation, continues notwithstanding that its members or participants change, and the affairs of which, like corporate affairs, are conducted by a single individual, a committee, a board, or some other group, acting in a representative capacity. It is immaterial whether such organization is created by an agreement, a declaration of trust, a statute, or otherwise. It includes a voluntary association, a joint-stock association or company, a "business" trust, a "Massachusetts" trust, a "common law" trust, an interinsurance exchange operating through an attorney in fact, a partnership association, and any other type of organization (by whatever name known) which is not, within the meaning of the Code, a trust or an estate, or a partnership.

* * * * *

* * *

Sec. 29.3797-4. *Partnerships*.—The Internal Revenue Code provides its own concept of a partnership. Under the term "partnership" it includes not only a partnership as known at common law, but, as well, a syndicate, group, pool, joint venture, or other unincorporated organization which carries on any business, financial operation, or venture, and which is not, within the meaning of the Code, a trust, estate, or a corporation. On the other hand the Code classifies under the term "corporation" an association or joint-stock company, the members of which may be subject to the personal liability of partners. If an organization is not interrupted by the death of a member or by a change in ownership of a participating interest during the agreed period of its existence, and its management is centralized in one or more persons in their representative capacities, such an organization is an association, taxable as a corporation. As to the characteristics of an association, see also sections 29.3797-2 and 29.3797-3.) * * *

No. 13,745

IN THE

United States Court of Appeals
For the Ninth Circuit

FONG WONE JING, FONG HUNG WING
and FONG NGAR JING, by their Guard-
ian Ad Litem, William Y. Fong,

Appellants,

vs.

JOHN FOSTER DULLES, as Secretary of
State,

Appellee.

BRIEF FOR APPELLANTS.

JACKSON & HERTOGS,

JOSEPH S. HERTOGS,

580 Washington Street, San Francisco 11, California,

ARTHUR J. PHELAN,

1306 Mills Tower, San Francisco 4, California,

Attorneys for Appellants.

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ian Ad Litem, William Y. Fong,

Appellants,

vs.

JOHN FOSTER DULLES, as Secretary of
State,

Appellee.

BRIEF FOR APPELLANTS.

JURISDICTIONAL STATEMENT.

Jurisdiction is conferred upon the Court below by Section 503 of the Nationality Act of 1940 (8 U. S. C. sec. 903, 54 Stat. 1171), which provides in pertinent part, as follows:

“If any person who claims a right or privilege as a national of the United States is denied such right or privilege by any Department or agency, or executive official thereof, upon the ground that he is not a national of the United States, such person, regardless of whether he is within the United States or abroad, may institute an action against

the head of such Department or agency in the District Court of the United States for the District of Columbia or in the district in which such person claims a permanent residence for a judgment declaring him to be a national of the United States. If such person is outside the United States and shall have instituted such an action in court, he may, upon submission of a sworn application showing that the claim of nationality presented in such action is made in good faith and has a substantial basis, obtain from a diplomatic or consular officer of the United States in the foreign country in which he is residing a certificate of identity stating that his nationality status is pending before the court, and may be admitted to the United States with such certificate upon the condition that he shall be subject to deportation in case it shall be decided by the court that he is not a national of the United States.”¹

Jurisdiction to review the judgment of the Court below is conferred upon this Court by 28 U. S. C. Section 1291.

The claim of right as citizens, and the denial of that right by the American Consulate General at Hong Kong, an official executive of the Department of State, of which appellee is the head, are pleaded in the complaint. (T. 3-7.)

¹This statute has been repealed by the Immigration and Nationality Act of 1952 (8 U. S. C. sec. 1101, et seq.) which became effective December 24, 1952, but Section 405 (a) of the latter Act continues the former statute in force and effect as to suits which were pending when the new Act became effective. (66 Stat. 280.)

STATEMENT OF THE CASE.

Appellants, Fong Wone Jing, female, age 19 years, Fong Hung Wing, male, age 17 years, and Fong Ngar Jing, female, age 15 years, claim to be citizens of the United States on the ground that their father, Fong Lim Fong, was a citizen of the United States at the times of their respective births in China. The claim of the oldest appellant arises under Section 1993 of the Revised Statutes,² as originally enacted, and the claims of the two younger appellants arise under the same section as amended by the Act of May 24, 1934. (48 Stat. 797.)³

²“All children heretofore born or hereafter born out of the limits and jurisdiction of the United States, whose fathers were or may be at the time of their birth citizens thereof, are declared to be citizens of the United States; but the rights of citizenship shall not descend to children whose fathers never resided in the United States.”

³“Any child hereafter born out of the limits and jurisdiction of the United States, whose father or mother or both at the time of the birth of such child is a citizen of the United States, is declared to be a citizen of the United States; but the right of citizenship shall not descend to any such child unless the citizen father or citizen mother, as the case may be, has resided in the United States previous to the birth of such child. In cases where one of the parents is an alien, the right of citizenship shall not descend unless the child comes to the United States and resides therein for at least five years continuously immediately previous to his eighteenth birthday, and unless, within six months after the child's twenty-first birthday, he or she shall take an oath of allegiance to the United States of America as prescribed by the Bureau of Naturalization.”

The requirement that such children must reside in the United States for at least five years immediately previous to attaining the age of 18 years was retrospectively changed by the 1940 Act to provide that such residence must be between the ages of thirteen and twenty-one years (8 U. S. C. 601 (g)(h)), and was again retrospectively changed by the 1952 Act to require that the child must come to the United States before attaining the age of twenty-three years and must be continuously physically present in the United States for five years between the ages of fourteen and twenty-eight years. (8 U. S. C. 1401 (b)(c).)

Following denial by the American Consulate General at Hong Kong of appellants' application to that Consulate for travel documents to permit them to proceed to the United States this suit was brought in the Court below. Appellants were then permitted to come forward to the United States as provided in Section 503 of the Nationality Act of 1940, *supra*, for the sole purpose of prosecuting this suit.

At the trial below it was stipulated that Fong Lim Fong (appellants' alleged father) came to the United States on November 5, 1929, that he was admitted into the United States as a citizen and that he was issued a Certificate of Identity by the immigration authorities. (T. 10.) He was subsequently in China from 1931 to 1933, and last departed from the United States for China on January 16, 1934. (T. 13.) He never returned to the United States thereafter (T. 13) and the testimony is that he died in China when the appellants were young children. (T. 62.) One of his children, Fong Hung Fong (also known as Fong Din Deck) was admitted into the United States as a citizen in 1949 and was subsequently issued a Certificate of Citizenship attesting to that status (T. 39) in accordance with Section 339 of the Nationality Act of 1940. (8 U. S. C. sec. 739.)

At the trial in the Court below the three appellants testified as witnesses, as did the older brother (who, as mentioned above, was admitted into the United States in 1949 as a citizen), their paternal grandmother, their father's brother (who is their guardian) and their

father's sister, who was born in the United States. The appellee offered no evidence.

The Court below made the following findings of fact:

"1. It is not true that the permanent residence and domicile of the persons who claim to be the plaintiffs Fong Wone Jing, Fong Hung Wing, and Fong Ngar Jing is within the Northern District of California, or in the United States of America.

2. The persons who claim to be plaintiffs Fong Wone Jing, Fong Hung Wing, and Fong Ngar Jing have failed to introduce evidence of sufficient clarity to satisfy or convince the Court that Fong Lim Fong is the natural blood father of persons known as Fong Wone Jing, Fong Hung Wing, and Fong Ngar Jing, or that the persons who, appeared before this Court claiming to be plaintiffs Fong Wone Jing, Fong Hung Wing and Fong Ngar Jing are in truth and fact Fong Wone Jing, Fong Hung Wing and Fong Ngar Jing."

(T. 13-14.)

The question involved is whether these findings are "clearly erroneous". (Rule 52 (a), Federal Rules of Civil Procedure.)

SPECIFICATION OF ERRORS.

Appellants have specified the following as the points on which they intend to rely on this appeal:

"1. That the findings of the District Court are clearly erroneous.

2. That the findings, conclusions and judgment of the District Court are unsupported by the evidence of record.

3. That the findings, conclusion and judgment of the District Court are contrary to the evidence of record.

4. That the District Court erred in finding that the plaintiffs-appellants did not have a claim to permanent residence within the Northern District of California or in the United States of America.

5. That the District Court erred in concluding that the plaintiffs-appellants, Fong Wone Jing, Fong Hung Wing and Fong Ngar Jing, and each of them, are not United States citizens''.

(T. 114-115.)

ARGUMENT.

1. STATEMENT OF THE EVIDENCE.

It was stipulated at the trial that Fong Lim Fong (alleged father of the appellants) was admitted to the United States as a citizen on November 5, 1929 and was issued a Certificate of Identity by the Immigration authorities, that according to immigration records he was subsequently in China from 1931 to 1933, and that he last departed from the United States on January 16, 1934. (T. 25, 28.)

Yee Song Mee, the mother of Fong Lim Fong, testified at the trial in the Court below that she came to the United States in 1915 (T. 27), and that her husband (who died in 1928) was born in the United States.

(T. 38.) She testified that Fong Lim Fong was her son (T. 25), that after he came to the United States he made a trip to China to get married (T. 27), that his wife was Jee Shee and that she had seen Jee Shee. (T. 27.) This witness was in China on a visit to the family's home village, the Gong Mee Village in the Toyshan District, in 1935 (T. 28-29), from which trip she returned in September, 1936. (T. 24.) She testified that when she arrived in China on that occasion her son, Fong Lim Fong, was residing in the Gong Mee Village with his wife, Jee Shee, that they were residing together as husband and wife (T. 29), that Fong Lim Fong introduced Jee Shee to her as his wife (T. 29), that they had a son and a daughter residing there with them when the witness arrived, that another son was born to them while witness was there (T. 29), and that the second daughter was born to them after witness returned to the United States, but that Fong Lim Fong had written her regarding the birth of that child. (T. 35.) This witness identified a photograph (Plaintiffs' Exhibit No. 5) as having been taken in 1936 in the Gong Mee Village a short time before she returned to the United States, testifying further (T. 33-34) that in the picture she is carrying her grandchild, Fong Hung Wing (the male appellant), and that the child standing in front of her in the photograph is her grandchild, Fong Hung Fong (appellants' older brother, who was admitted to the United States as a citizen in 1949). She also identified the persons shown in a later photograph (Plaintiffs' Ex. No. 3) as her daughter-in-law, Jee Shee, and her four grand-

children, viz., the three appellants and their older brother, Fong Hung Fong. (T. 27-28.)

This older brother, Fong Hung Fong (also known as Fong Din Deck) testified that he came to this country in 1949 (T. 52), that the appellants are his brother and sisters, that before he came to the United States he lived with them in the Gong Mee Village, that Jee Shee is his mother and the appellants' mother, that Fong Lim Fong is his father and the appellants' father, that their mother, Jee Shee, always lived with them in China, that he last saw his father, Fong Lim Fong, about 1938 and that he remembers his father. (T. 53-54, 56.) He identified a photograph of his father (T. 56) and identified the persons in the group photograph (Plaintiffs' Exhibit No. 3) consisting of his mother, the three appellants and himself. (T. 58.)

Each of the three appellants testified that they were all born in the Gong Mee Village, that until they came to the United States in April, 1952 they always resided together in that village with their mother, Jee Shee, that Fong Lim Fong was their father, and that their oldest brother, Fong Hung Fong (Fong Din Deck), lived with them until he came to the United States in 1949. (T. 59-62, 66-69, 70-72.) Each identified the photograph of the adult female in Plaintiffs' Exhibit No. 3 as that of their mother, Jee Shee. (T. 53-64, 69, 72-73.)

Ruby Fong Yee, the sister of appellants' father, also testified. She was born in the United States on Octo-

ber 5, 1916 (T. 74) and accompanied her mother (appellants' grandmother) to China on the trip in 1935-1936. (T. 74-75.) During the eleven months they were in China at that time they lived with Fong Lim Fong and his wife, Jee Shee, in the Gong Mee Village. (T. 75.) At that time Fong Lim Fong and Jee Shee had two children, Fong Hung Fong (appellants' older brother) and Fong Wone Jing (the eldest appellant). (T. 75.) Their second boy, Fong Hung Wing, was born while the witness was there, and the second girl, Fong Ngar Jing, was born after the witness returned to the United States. (T. 76.) This witness testified (T. 78) that she personally took the picture (Plaintiffs' Exhibit No. 3) which was taken in the Gong Mee Village in 1936. That is the photograph in which witness Yee Song Mee pointed out her grandchildren, Fong Hung Wing and Fong Hung Fong. Witness Ruby Fong Yee also identified photographs of Fong Lim Fong (T. 74) and of his wife, Jee Shee, and their four children. (T. 78.)

William Y. Fong, brother of Fong Lim Fong, also testified. He was last in China in 1929 (T. 44) and had therefore never seen the children of Fong Lim Fong until they came to the United States (T. 49) but he produced a number of checks dated in 1940 covering remittances which he testified he sent to China for the support of Fong Lim Fong's wife and children. (T. 45-46.)

The foregoing was the testimony offered in this case. It was entirely uncontradicted and unimpeached. The appellee offered no evidence.

To summarize briefly: six witnesses gave testimony on the direct fact of the claimed relationship. Four of these were the children who had always lived together in the home of Fong Lim Fong and Jee Shee and who testified that the latter were their father and mother. The oldest of these was admitted into the United States in 1949 as the citizen son of Fong Lim Fong. That child holds a Certificate of Citizenship based on that relationship, which was issued to him under Sec. 339 of the Nationality Act of 1940. (8 U. S. C. Sec. 739.) The paternal grandmother and a paternal aunt of these four children, who had spent about eleven months at their home in China in 1935-1936, testified directly as to their knowledge that three of these children (one of whom was born during their visit there) were members of the family and household of Fong Lim Fong and his wife, Jee Shee. They produced a photograph taken at that time by the aunt which shows the grandmother with two of the children, who were then very young. The Government made no attempt to dispute the testimony that Fong Hung Fong and appellant Fong Hung Wing are the children shown with the grandmother in that photograph.

It is difficult to perceive how a stronger showing could have been made that these appellants are the children of Fong Lim Fong and his wife, Jee Shee. It is true that testimony of the parents was unobtainable, the father being deceased and the mother being in Communist China. It is understood, however, that the mother, Jee Shee, did accompany the appellants to the American Consulate General at Hong Kong

when they made their application for travel documents, but whatever testimony was taken from her at that time is not available, since the Consulate's file pertaining to the case cannot be located by the Government. (T. 20, 83.)

The Court below in giving judgment against appellants filed no opinion but set forth in its memorandum order for judgment (T. 11-12) that the evidence presented by appellants did not conform to the standards enunciated in the opinion filed the same day in the case of *Ly Shew v. Acheson*, 110 F. S. 50.

2. THE FINDINGS OF FACT ARE "CLEARLY ERRONEOUS," ARE UNSUPPORTED BY THE EVIDENCE AND ARE CONTRARY TO THE EVIDENCE.

While this is one of the first cases of its type to come before this Court by way of an appeal from a judgment in an action under 8 U. S. C. sec. 903, *supra*, this Court has long dealt with the same situation in previous cases which have come before it both in habeas corpus proceedings, wherein an administrative decision is under collateral attack, and in appeals in deportation cases after a judicial trial on the merits under certain sections of the Chinese Exclusion Acts. We submit that the principles frequently laid down by this Court in those types of cases are pertinent here, for reasons which we shall hereinafter discuss.

The extent of this Court's appellate review of the findings of fact of the trial Court is prescribed by

Rule 52 (a) of the Federal Rules of Civil Procedure. In construing that Rule the Supreme Court has said:

“It was intended, in all actions tried upon the facts without a jury, to make applicable the then prevailing equity practice. Since judicial review of findings of trial courts does not have the statutory or constitutional limitations of findings by administrative agencies, or by a jury, this Court may reverse findings of fact by a trial court where ‘clearly erroneous’. The practice in equity prior to the present Rules of Civil Procedure was that the findings of the trial court, when dependent upon oral testimony where the candor and credibility of the witnesses would best be judged, had great weight with the appellate court. The findings were never conclusive, however. A finding is ‘clearly erroneous’ when although there is evidence to support it, the reviewing Court on the entire evidence is left with the definite and firm conviction that a mistake has been committed.”

U. S. v. U. S. Gypsum Co., 333 U. S. 364, 394-395, 68 S. Ct. 525, 541-542, 92 L. Ed. 746.

“A finding of fact is clearly erroneous if it is against the clear weight of the evidence.”

Fleming v. Palmer (C.A. 1) 123 F. (2d) 749, 751 (cert. den. 316 U. S. 662, 65 S. Ct. 942, 86 L. Ed. 1739).

Accord:

St. Louis Union Trust Co. v. Finnegan (C.A. 8) 197 F. (2d) 565, 568.

Or if it is against the positive, uncontradicted and unimpeached testimony.

Foran et al. v. Comm. of Internal Revenue
(C.A. 5) 165 F. (2d) 705, 707.

“Both under Rule 52 (a) of the Rules of Civil Procedure, and well established equitable principles, we are not bound by the trial court’s findings if we are of the view that they are against the great weight of the evidence.”

Gutowsky v. Jones et al. (C.A. 10) 178 F. (2d)
60, 65.

Unimpeached and uncontradicted testimony cannot be disregarded.

Chesapeake and Ohio Ry. Co. v. Martin, 283
U. S. 209, 216-217, 51 S. Ct. 453, 75 L. Ed.
983, 987-988;

Grace Bros. v. Commissioner of Int. Revenue
(C.A. 9) 173 F. (2d) 170, 174;

*San Francisco Assn. for the Blind v. Industrial
Aid for the Blind, Inc.* (C.A. 8) 152 F. (2d)
532, 536.

In *Foran et al. v. Commissioner of Internal Revenue* (C.A. 8), *supra*, wherein the only evidence before the trial Court was the testimony of one of the parties the appellate court said:

“We think the court’s refusal to follow the sworn testimony is contrary to law, and requires the setting aside of its fact-finding as it would that of a jury.”

Moreover, as stated by the Court of Appeals for the Second Circuit in

Orvis v. Higgins, 180 F. (2d) 537, 540 (cert. denied 71 S. Ct. 37, 340 U. S. 810, 95 L. Ed. 595).

“It follows that evidence sufficient to support a jury verdict or an administrative finding may not suffice to support a trial judge’s finding.”

We submit that in the case at bar the findings are “clearly erroneous” within the meaning of Rule 52 (a), *supra*, in that they are against the clear weight of the evidence, which is all one way and which is positive, uncontradicted and unimpeached. We submit, further, that under principles laid down by this Court in many cases, a finding against appellants on this record would not withstand appellate review even if made by an administrative tribunal whose decisions are declared to be final by statute. (8 U. S. C. sec. 153.)

In

Go Lun v. Nagle, 22 F. (2d) 246, 248,
with regard to such a review this Court said:

“We fully appreciate the narrow limits of the jurisdiction of the courts on habeas corpus proceedings to review decisions of the immigration tribunals; but ‘the error of an administrative tribunal may, of course, be so flagrant as to convince a court that the hearing had was not a fair one’. *Tisi v. Tod*, 264 U. S. 131, 44 S. Ct. 260, 68 L. Ed. 590. Such a case is presented here.

A reading of the entire testimony of the three witnesses leaves not the slightest room for doubt that their relationship was fully established, and that the appellant is a citizen of the United States. A contrary conclusion is arbitrary and capricious and without any support in the testimony.

In *Johnson v. Damon* (CCA) 16 F. (2d) 65, the court considered discrepancies on which an excluding decision was based, more important than any disclosed by the present record and in reference to the excluding decision said 'The mind revolts against such methods of dealing with vital human rights.' That language might well be applied here."

The case of *Johnson v. Damon*, from which this Court quoted the forceful language just mentioned, involved two Chinese boys who sought entry as sons of a citizen who had died when they were infants. Their testimony was supported by that of a previously admitted brother and an uncle. The evidence, therefore, was basically similar to that in the case at bar but somewhat weaker. Despite the statutory limitations upon the power of the Court to review the administrative decision, the Court in that case was impelled to overturn that decision in the forceful language quoted by this Court in the *Go Lun* case, *supra*.

In speaking of the rejection by administrative tribunals of uncontradicted and unimpeached testimony by the appellant and his alleged relatives in

Gung You v. Nagle, 34 F. (2d) 848, 852,
this Court said:

“The mere hearing of witnesses by an officer is of no avail to a party, if the evidence of competent witnesses is to be entirely disregarded and findings made in the teeth of the testimony of one or a dozen such witnesses, either because of a fixed policy, to *give a weight to a presumption of law far beyond the legislative intent*, or because of a policy calculated to entrap the witness * * *.” (Italics added.)

In that case, the Court went on to say:

“Relationship is not usually proved by physical facts, and never is where the mother does not testify, but by pedigree reputation in the family, and by the conduct of the parties, including the manner in which they live. The fact that a small child lives in the home of its alleged parents and that they maintain toward each other the obligations involved in the relationship is evidence favorable to the issue, and evidence that they did not live together and did not conduct themselves as parents and child is evidence to the contrary.

Such evidence is not collateral evidence; it is direct and material evidence on the issue.”

In conclusion, this Court held that the rejection of the evidence of the several witnesses was purely arbitrary.

See also:

Quan Toon Jung v. Bonham (C.A. 9) 119 F.
(2d) 915;

Wong Tsick Wye et al. v. Nagle (C.A. 9) 33
F. (2d) 226.

In

Chun Kwock Quan v. Proctor, 92 F. (2d) 326, this Court has extensively reviewed the well established principles applicable to judicial review of *administrative* findings in Chinese citizenship cases. In that case the Court points out that such findings must have some factual support in the record, that suspicion may not take the place of actual evidence, that evidence may not be disregarded because of a belief that frauds may have been committed by other Chinese in other cases, and that it is the province of the Courts, in proceedings for review of decisions of the immigration officials, to prevent abuse of the statutory power wielded by them.

It seems obvious that an administrative finding of fact adverse to the appellants would not withstand even the limited review afforded on habeas corpus proceedings, under the foregoing decisions and many others to the same effect. Moreover, it is plain under the authorities hereinbefore cited that the power of appellate review of findings of fact under Rule 52 (a) of the Federal Rules of Civil Procedure is even *broad*er than it is in the case of administrative findings which carry statutory finality. Consequently, we submit that the findings of the Court below are "clearly erroneous" within the meaning of Rule 52 (a) of the Federal Rules of Civil Procedure.

Furthermore, this Court, in considering appeals from judgments entered in judicial deportation proceedings under former Sec. 282 of Title 8 U. S. C., has held that uncontradicted and unimpeached testi-

mony of witnesses in behalf of the defendant cannot be disregarded by the trial Court.

Wong Kam Chong v. U. S. (C.A. 9) 111 F. (2d) 707, 712;

Lee Hin v. United States (C.A. 9) 74 F. (2d) 172.

This Court has further held that in such proceedings the evidence must be weighed in the light of the defendant's ability to produce evidence (*Lee Hin v. United States*, supra), that such evidence cannot be rejected because the witnesses are Chinese (*Yee Chung v. United States* (C.A. 9) 243 F. 126, 130; *Lau Hu Yuen v. United States* (C.A. 9) 85 F. (2d) 327, 330) and that the requirement of former Sec. 284, supra, that citizenship of a Chinese person must be proved "to the satisfaction of" the Judge or Commissioner "means nothing more than that the proofs must be sufficient to satisfy reasonable judicial standards". (*Ching Hong Yuk v. United States* (C.A. 9) 23 F. (2d) 174, 175.)

We submit that the foregoing principles enunciated by this Court in reviewing administrative decisions and judgments in judicial deportation proceedings are applicable here by analogy. The scope of the appellate review under Rule 52 (a) of the Federal Rules of Civil Procedure is *at least* as broad as in habeas corpus or judicial deportation proceedings. Here the evidence submitted by appellants to establish their citizenship is positive, uncontradicted and unimpeached. The four children, the aunt and the grandmother gave testimony directly upon the issue. They

produced a photograph taken by the aunt more than sixteen years ago which shows two of the children with the grandmother. The testimony of the uncle regarding his remittances for the support of his brother's wife and children in China is to that extent corroborative of the direct testimony given by the other six witnesses. No contradictory or counter-vailing evidence has been submitted. We submit that under the well-settled principles mentioned above the findings of the Court below adverse to the claim of appellants are "clearly erroneous" within the meaning of Rule 52 (a) of the Federal Rules of Civil Procedure.

In its memorandum decision the Court below made reference to standards set forth in its opinion filed the same day in the case of *Ly Shew v. Acheson*, *supra*. Brief discussion of that opinion is therefore pertinent.

Preliminarily it appears from the *Ly Shew* opinion that the Court below was considerably dismayed by the fact that some seven hundred suits of this type are pending. But the real significance of the pendency of so large a number of suits under section 503 of the Nationality Act of 1940 (8 U. S. C. sec. 903) should not be overlooked. That situation is the direct result of the adoption by the State Department within the last three years of a policy which prevents Chinese persons seeking admission to the United States as the children of citizens from proceeding to a port of entry in the United States (as they had theretofore done) and submitting their evidence to the statutory tri-

bunals created by the immigration laws to determine the right of persons to enter the United States.

Throughout the years until about 1950 the State Department permitted such applicants to set forth their citizenship claim by affidavit, which affidavit was then endorsed by the Consulate as valid for the purpose of traveling to a port of the United States to have the claim determined by the immigration tribunals under 8 U. S. C. secs. 152, 153. Those sections of the immigration laws provided for hearings before boards of special inquiry in all doubtful cases, with a complete record of the proceedings and of all testimony produced, and a statutory appeal to the Attorney General by the applicant or any dissenting member of such board.⁴ By regulation effective December 11, 1946 the right to counsel in such proceedings was provided. (8 C. F. R. 130.2—1946 Suppl.) Adverse decisions of the immigration authorities were reviewable by habeas corpus, and after the effective date of 8 U. S. C. sec. 903, *supra*, by a suit thereunder where a claim of citizenship had been denied. Under that procedure most of the cases of this type were disposed of administratively and did not reach the Courts.

Commencing something less than three years ago the Consulate General at Hong Kong began refusing travel documentation to large numbers of these applicants on the ground that their evidence of citizenship was "not satisfactory", and for the past year and a half relatively few of these citizen applicants have

⁴Similar procedures are provided in the new Immigration and Nationality Act of 1952. (8 U. S. C. secs. 1225, 1226.)

been permitted to come forward. The purported authority for this new procedure is the Passport Act of May 22, 1918, as amended June 21, 1941 (22 U. S. C. secs. 223-226), which provides in pertinent part as follows:

Sec. 223:

*“When the United States is at war or during the existence of the national emergency proclaimed by the President on May 27, 1941, or as to aliens wherever there exists a state of war between, or among, two or more states, and the President shall find that the interests of the United States require that restrictions and prohibitions in addition to those provided otherwise than by sections 223-226b of this title be imposed upon the departure of persons from and their entry into the United States, and shall make public proclamation thereof, it shall, until otherwise ordered by the President or Congress, be unlawful * * *”* (Italics added.)

Sec. 224:

“After such proclamation as is provided for by section 223 of this title has been made and published and while said proclamation is in force, it shall, except as otherwise provided by the President, and subject to such limitations and exceptions as the President may authorize and prescribe, be unlawful for any citizen of the United States to depart from or enter or attempt to depart from or enter the United States unless he bears a valid passport.”

On November 14, 1941 the President issued Proclamation No. 2523 (55 Stat. 1696), which provided that

no citizen should enter the United States without a valid passport unless he came within such exceptions as might be prescribed by the Secretary of State. Until about 1950, as indicated above, the State Department in practice permitted Chinese persons seeking entry as children of citizens to proceed to the United States on a visaed affidavit and have their claim determined by the immigration authorities at the port of entry.

Under the new policy inaugurated some two years ago the consular authorities at Hong Kong have undertaken to make final disposition of these citizenship claims. Where they refuse to issue any sort of travel documentation the applicant is effectively prevented from proceeding to a port of entry in the United States, since transportation lines will not accept an undocumented passenger for fear of possible penal proceedings under 22 U. S. C. sec. 225. The result is that applicants of this class are faced with final administrative rejection of their claim of citizenship on the basis of an interview with a consular officer, without benefit of counsel, where the putative father and other relatives are ordinarily unable to appear for personal testimony since they are usually residing in the United States. Normally the only reason given the applicant for rejection of his claim is that the consular officer is "not satisfied." This Court has cited a similar executive tendency to give short shrift to citizenship claims as "one of the reasons why there is current in America the phrase 'a Chinaman's chance'." (*Yuen Boo Ming v. United States*, 103 F. (2d) 355, 358.)

In this situation it is certainly not at all surprising that some seven hundred of these rejected applicants have invoked the jurisdiction of the Courts under 8 U. S. C. sec. 903, *supra*.

As stated by this Court in

Wong Wing Foo v. McGrath, 196 F. (2d) 120,
122:

“The right to citizenship is a priceless thing and Congress in enacting Section 903 in 1940 well could have decided that citizenship should not be denied one possessing it, by an administrative proceeding such as 8 U. S. C.A. sec. 153, first enacted in 1917, in which the right to any counsel is denied and where hearsay evidence which may be determinative is admissible (citing cases) and in which the finding as to citizenship is deemed final (citing cases).”

Certainly the summary rejection of such citizenship claims by a consular officer without formal proceedings of any kind would inevitably force such applicants into Court under sec. 903, *supra*. They have no other recourse unless they are to relinquish their birthright at the mere fiat of some consular employee.

Obviously, under the circumstances the fact that their case is but one of some seven hundred should not weigh against these appellants. Moreover, it is no more reasonable to assume that these are seven hundred fraudulent cases than it is to assume that they are cases in which there has been arbitrary rejection by the consulate of bona fide citizenship claims. The situation is not of appellants' choosing.

They were perfectly willing to submit their evidence and witnesses to the scrutiny of the immigration tribunals at a formal hearing had they been permitted to do so.

In this connection we would make one further observation. The travel restrictions for citizens under which this new consular procedure has been adopted apply only during war or national emergency.⁵ At no other time is there statutory authority to impose a mandatory requirement that a citizen obtain a travel document before seeking to enter the United States. In House Report No. 2041 on the Joint Resolution to continue the effective period of these and other emergency provisions the Committee on the Judiciary of the House of Representatives said relative to these travel restrictions that the measure would be necessary "in order to control the entry and departure of *subversive* individuals, whether aliens or citizens, and other persons whose movements, *in the interests of national security* should be restricted". (U. S. Code Cong. and Adm. News, 82nd Congress, 2nd Session, Vol. 2 at page 1936.) To use these emergency security controls for the summary rejection of claims of citizenship at a consulate abroad on other than security grounds is indeed a peremptory method of dealing with the priceless right of citizenship. Again we say it is not surprising that the rejected claimants seek redress from the Courts under sec. 903, *supra*.

⁵The comparable provisions of the new Immigration Act of 1952 contain a similar limitation. (8 U. S. C. sec. 1185.)

It is true that the new Immigration and Nationality Act of 1952 provides for this type of suit only where the claimant is in the United States (8 U. S. C. sec. 1503). However, that Act specifically provides in section 405 thereof that suits filed before it became effective shall not be affected (66 Stat. 280).

Nor is the application of sec. 903, *supra*, limited to case involving alleged expatriation; it is available to any person claiming citizenship who has been refused permission to come to the United States by a consular officer. (*Acheson v. Yee King Gee* (CA 9) 184 F. (2d) 382; *Wong Wing Foo v. McGrath*, *supra*.)

Certain statistical data relative to Chinese citizenship cases generally are set forth in the opinion in the *Ly Shew* case. Since the record is silent as to the methods used in arriving at the figures cited we have no way of determining their accuracy. However, the asserted preponderance of male offspring over female offspring in the claims of citizen Chinese clearly does not apply here, since this family has two sons and two daughters. Likewise, the fact that more male than female children may actually apply to come to the United States is not present in the case at bar. Nor does there appear to be anything surprising in the fact that many American citizens of Chinese extraction have married in China and have had children born there of such marriages. Let us examine this situation with respect to the case at bar. *It was never possible for Fong Lim Fong to bring his wife, Jee*

Shee, to the United States. The Immigration Act of 1924 (8 U. S. C. sec. 213) originally made Chinese wives of citizens inadmissible. (*Chang Chan v. Nagle*, 268 U. S. 346, 45 S. Ct. 540, 69 L. Ed. 988.) That prohibition was modified on June 13, 1930, but only as to those who had married citizens before May 26, 1924. (46 Stat. 581.) Other Chinese wives of citizens were not accorded nonquota classification until August 9, 1946 (60 Stat. 975), and this amendment came too late to benefit Jee Shee, since her husband was then deceased. Theoretically, a Chinese person could come to the United States after the repeal of the Chinese Exclusion Acts on December 17, 1943 (57 Stat. 600), *if reached under the annual quota of 105*, but the chances of being so reached were obviously remote because of the oversubscribed condition of the quota. For example, as of August 1, 1952 (we have no earlier figures) the Chinese quota had a waiting list of 2,495. (Report of President's Commission on Immigration and Naturalization pursuant to Executive Order No. 10392, at page 104.)

We think the foregoing factual observations demonstrate the danger of attempting to apply sweeping generalizations to individual cases. Moreover, we venture to observe that history is studded with the attempts of the executive branches of governments to justify disregard of the rights of individuals on the ground that it is necessary to do so in order to prevent abuses. To strike a balance between the demands of administrative expediency and the vital rights of

individuals is the *raison d'être* of such judicial remedies as are provided by sec. 903, *supra*, and herein, we think, lies the explanation of the large number of such suits which have been filed within the past two years. The volume of that litigation, we submit, should not operate to the detriment of these appellants.

The opinion in the *Ly Shew* case contains certain observations regarding the custom of United States citizens of Chinese race marrying in China, begetting children there and not bringing such children to the United States in many instances until they are in their teens. The statute, however, permits citizenship to descend and to be retained under such circumstances. The wisdom of the legislation is, of course, solely for Congress to determine. Section 1993 of the Revised Statutes was originally enacted in 1866. During the intervening eighty-seven years Congress has seen fit to make changes in the statute (to operate prospectively) only to the extent of requiring that children born after 1934 must come to the United States before they attain the age of 16 years (48 Stat. 797; 54 Stat. 1139, sec. 201 (g) and (h)), now changed to 23 years (8 U. S. C. sec. 1401 (b) (c)), and that citizenship would descend after the effective date of the Nationality Act of 1940 only if the citizen parent had a prescribed period of residence in the United States. (54 Stat. 1139.)

The basic statute, with the amendments mentioned above, has been in operation for nearly a century and

certainly during that time Congress has been cognizant of the fact that citizens of Chinese race were begetting and raising citizen children in China. Yet Congress throughout that time has seen fit to preserve the citizenship of such children, having simply enacted certain prospective limitations to which we have just alluded. Moreover, while Congress has now prospectively limited suits for judgments declaring citizenship to persons who are within the United States, Congress was careful to preserve the former statute (8 U. S. C. sec. 903) as to suits which were pending when the 1952 statute went into effect.

We are not disposed to question where the burden of proof lies in these cases, nor whether it shifts at any stage of the proof. We do contend most earnestly that where, as here, there is positive, uncontradicted and unimpeached testimony of six persons as to the existence of the asserted relationship, a decision adverse to the claimants cannot be supported. We submit that this view is sustained by the numerous cases cited above in which this Court, in one type of proceeding or another, has considered questions closely analogous to those presented here. We submit further that those decisions are authority for the propositions that such evidence may not be rejected because the witnesses are Chinese, nor because of mere suspicion or conjecture, nor because of a belief that frauds have been practiced by other individuals, nor because of considerations which fall within the realm of legislative policy, nor because of a policy "to give weight to a

presumption of law far beyond the legislative intent". Judged by these settled principles, we submit that the findings of the Court below in this case are "clearly erroneous" within the meaning of Rule 52 (a) of the Federal Rules of Civil Procedure.

The Court below erred in concluding that appellants did not have a claim of permanent residence in the Northern District of California.

With regard to the first finding of fact we would point out additionally that the allegation in the complaint (T. 5) that appellants claim permanent residence within the Northern District of California constituted sufficient basis for invoking the jurisdiction of the Court under 8 U. S. C. sec. 903, *supra*. (*Acheson v. Yee King Gee*, *supra*.) This particular finding does not go to the merits of the case, and since the statute permits the claimant to sue in the "District of Columbia *or in the district in which such person claims a permanent residence* (italics added)" obviously it was intended to permit the claimant to choose the forum. Apparently the first finding of the Court below is merely ancillary to the further finding that appellants had failed to prove that they are the children of Fong Lim Fong, and the latter finding, we submit, cannot stand for the reasons heretofore discussed.

The Court below erred in concluding that appellants are not citizens of the United States.

For the reasons and under the authorities hereinbefore discussed we submit that the Court below erred

in holding that appellants had failed to establish their United States citizenship.

The positive, uncontradicted and unimpeached testimony given by the four children was supported by that of the grandmother, an aunt and an uncle, was further corroborated by the fact that the immigration records over a period of many years show not only the geneology and citizenship of the putative father, but also show that the grandmother and aunt made the trip to China in 1935-1936 and further show that the brother was admitted as a citizen son of the father in 1949, all of this being buttressed by a photograph taken by one of the witnesses in China seventeen years ago showing the brother and one of the appellants with the grandmother.

If this positive, uncontradicted and unimpeached evidence be insufficient to establish citizenship under Sec. 1993 of the Revised Statutes it is difficult to see how any Chinese child of a United States citizen could establish his citizenship. We submit that the rejection of that evidence in this case was clearly erroneous under the authorities we have cited. Moreover, suspicion is insufficient to support such a finding of fact.

Wong Gook Chun v. Proctor, (C.A. 9) 84 F. (2d) 763, 765;

Tillinghast v. Wong Wing (C.A. 1), 33 F. (2d) 290.

As a matter of fact, certain remarks of the trial Court tend to indicate that the Court did not dis-

believe the witnesses in this case (T. 85, 101-102) but felt that to give judgment for appellants would amount to making American citizens, just as is done under the naturalization process. (T. 102.)

We do not think that a judgment declaring citizenship under sec. 903, *supra*, is discretionary to the same extent as a decree granting citizenship in a naturalization proceeding. If these appellants are children of Fong Lim Fong, then they are citizens of the United States under a statute which made them citizens at birth. The power and duty of the Court under sec. 903, *supra*, are simply to declare such citizenship if it exists. This, therefore, is a fact issue to be litigated under principles and standards applicable generally to civil causes in the Federal Courts. Under those principles and standards we submit that the findings of the trial Court in this case cannot be sustained. A finding cannot rest upon mere speculation, conjecture, surmise, guess or suspicion.

Penn. R. Co. v. Chamberlain, 288 U. S. 333, 344, 53 S. Ct. 391, 395, 77 L. Ed. 819, 825;

Controller of California v. Lockwood (C.A. 9) 193 F. (2d) 169, 172;

United States v. Sandifer (C.A. 5) 76 F. (2d) 551;

Doggett v. Peek et al. (C.A. 5) 116 F. (2d) 273, 274.

Certainly the positive, uncontradicted and unimpeached evidence produced by appellants was sufficient to establish the existence of the relationship asserted

under "reasonable judicial standards". (*Ching Hong Yuk v. United States*, supra.)

CONCLUSION.

We submit that the findings of the Court below are "clearly erroneous," and that the judgment should be reversed.

Dated, San Francisco, California,

May 27, 1953.

JACKSON & HERTOGS,

JOSEPH S. HERTOGS,

ARTHUR J. PHELAN,

Attorneys for Appellants.

No. 13,745

IN THE

United States Court of Appeals
For the Ninth Circuit

FONG WONE JING, FONG HUNG WING
and FONG NGAR JING, by their
Guardian Ad Litem, William Y.
Fong,

Appellants,

vs.

JOHN FOSTER DULLES, as Secretary of
State,

Appellee.

BRIEF FOR APPELLEE.

LLOYD H. BURKE,

United States Attorney,

CHARLES ELMER COLLETT,

Assistant United States Attorney,

422 Post Office Building,

7th and Mission Streets, San Francisco 1, California,

Attorneys for Appellee.

MORTON M. LEVINE,

Immigration and Naturalization Service,

On the Brief.

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PAUL P. O'BRIEN

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No. 13,745

IN THE

**United States Court of Appeals
For the Ninth Circuit**

FONG WONE JING, FONG HUNG WING
and FONG NGAR JING, by their
Guardian Ad Litem, William Y.
Fong,

Appellants,

vs.

JOHN FOSTER DULLES, as Secretary of
State,

Appellee.

BRIEF FOR APPELLEE.

INTRODUCTORY STATEMENT.

The appeals in this case and in cases No. 13,746, *Chow Sing etc., v. Brownell*, and No. 13,808, *Ly Shew, etc., v. Dulles*, are concerned with claims to United States nationality by Chinese who are not residents of the United States, founded upon alleged blood relationship as children to fathers who are citizens of the United States. The judgment in each of the cases followed the opinion of Judge Louis E. Goodman in

the *Ly Shew* case, 110 F. Supp. 550. Each claimant has not previously resided or entered the United States, the claim of nationality is therefore derivative, not native birth. In the above case and the *Ly Shew* case the Secretary of State is the defendant. In the *Chow Sing* case the Attorney General is the defendant.

STATUTES.

“§903. Judicial proceedings for declaration of United States nationality in event of denial of rights and privileges **as national; certificate of identity pending judgment.** If any person who claims a right or privilege as a national of the United States is denied such right or privilege by any Department or agency, or executive official thereof, upon the ground that he is not a national of the United States, such person, regardless of whether he is within the United States or abroad, may institute an action against the head of such Department or agency in the District Court of the United States for the District of Columbia or in the district court of the United States for the district in which such person claims a permanent residence for a judgment declaring him to be a national of the United States. If such person is outside the United States and shall have instituted such an action in court, he may, upon submission of a sworn application showing that the claim of nationality presented in such action is made in good faith and has a substantial basis, obtain from a diplomatic or consular officer of the United States in the foreign country in which

he is residing a certificate of identity stating that his nationality status is pending before the court, and may be admitted to the United States with such certificate upon the condition that he shall be subject to deportation in case it shall be decided by the court that he is not a national of the United States. Such certificate of identity shall not be denied solely on the ground that such person has lost a status previously had or acquired as a national of the United States; and from any denial of an application for such certificate the applicant shall be entitled to an appeal to the Secretary of State, who, if he approves the denial, shall state in writing the reasons for his decision. The Secretary of State, with approval of the Attorney General, shall prescribe rules and regulations for the issuance of certificates of identity as above provided. Oct. 14, 1940, c. 876, Title I, Subchap. V, §503, 54 Stat. 1171."

Sec. 1993, Revised Statutes.

"All children heretofore born or hereafter born out of the limits and jurisdiction of the United States, whose fathers were or may be at the time of their birth citizens thereof, are declared to be citizens of the United States; but the rights of citizenship shall not descend to children whose fathers never resided in the United States."

Act May 24, 1934—48 Stat. 797.

"CITIZENSHIP OF CHILDREN BORN ABROAD OF CITIZEN FATHERS (Acts of April 14, 1802, and February 10, 1855, as amended by Act of May 24, 1934)

Sec. 1993. Any child hereafter born out of the limits and jurisdiction of the United States, whose father or mother or both at the time of the birth of such child is a citizen of the United States, is declared to be a citizen of the United States; but the rights of citizenship shall not descend to any such child unless the citizen father or citizen mother, as the case may be, has resided in the United States previous to the birth of such child. In cases where one of the parents is an alien, the right of citizenship shall not descend unless the child comes to the United States and resides therein for at least five years continuously immediately previous to his eighteenth birthday, and unless, within six months after the child's twenty-first birthday, he or she shall take an oath of allegiance to the United States of America as prescribed by the Bureau of Naturalization. (Sec. 1, Act of May 24, 1934, 48 Stat. 797; 8 U.S.C. 6)."

STATEMENT OF THE CASE.

The appellants herein claim to be children of Fong Lim Fong, alleged to be their father and a citizen of the United States at the times of their respective births, in China. Paragraph VI of the complaint alleges:

"VI

"That on or about January 24, 1951, an application was filed with the American Consulate General at Hong Kong for the issuance of a United States passport or travel document in be-

half of plaintiff, Fong Hung Wing; that on or about May 10, 1951, an application was filed with the American Consulate General at Hong Kong for the issuance of a United States passport or travel document in behalf of plaintiffs, Fong Wone Jing and Fong Ngar Jing; that the applicants and each of them were informed by the American Consulate General at Hong Kong on or about January 24, 1952, that their applications for documentation had been denied, and that 'the Consulate General declines to afford you facilities for the execution of an affidavit for the purpose of travelling to the United States'; and that the plaintiffs, Fong Wone Jing, Fong Hung Wing and Fong Ngar Jing, claim that the refusal of the American Consulate General at Hong Kong to permit the said Fong Wone Jing, Fong Hung Wing and Fong Ngar Jing to proceed to a port of entry in the United States for the purpose of having their admissibility determined by the administrative agency charged with such duty is an arbitrary and unreasonable refusal or denial of a right or privilege of a United States national."

The answer to paragraph VI of the complaint is contained in paragraph VI of the answer.

"VI

"Answering Paragraph VI of the Complaint, defendant has no knowledge, information or belief as to the allegations contained in Paragraph VI of the Complaint and therefore denies the same."

Page 4 of appellants' brief, first paragraph, makes the following statement:

“Following denial by the American Consulate General at Hong Kong of appellants' application to that Consulate for travel documents to permit them to proceed to the United States this suit was brought in the Court below. Appellants were then permitted to come forward to the United States as provided in Section 503 of the Nationality Act of 1940, *supra*, for the sole purpose of prosecuting this suit.”

The record contains no evidence to support paragraph VI of the complaint or the quoted statement from page 4 of the brief. Appellants made no attempt to introduce any evidence to establish the jurisdictional prerequisite of 8 U.S.C. 903. It would appear to have been assumed that because an action was filed, and because certain persons appeared in Court, that ergo, the Court could and should proceed to judgment. The judge of the lower Court found that “It is not true that the permanent residence of the persons who claim to be plaintiffs * * * is within the Northern District of California or in the United States of America.” Also that the evidence was not “of sufficient clarity to satisfy or convince the court” that the appellants were the blood children of the alleged father or that they were the persons they claimed to be.

The record is conclusive that prior to the filing of the complaint none of the appellants had ever been in the United States. The witnesses called by the appel-

lants were all interested persons in the claimed family of the appellants—the alleged paternal grandmother, the alleged father's brother and sister, an alleged older brother, and the three appellants. No birth, school, village, or other identification documents were produced by the appellants.

SPECIFICATIONS OF ERROR.

Appellants have made five specifications of error, but state the question involved singly as “Whether the lower court's findings are ‘clearly erroneous’.” Specifications 1-2-3 and 5 are embodied within the single question. Specification 4, however, raises a very important jurisdictional question.

“4. That the District Court erred in finding that the plaintiffs-appellants did not have a claim to permanent residence within the Northern District of California or in the United States of America.”

QUESTIONS PRESENTED.

1. *Jurisdiction.*

(a) Does the United States District Court have jurisdiction under 8 U.S.C. 903 to declare nationality of a foreign born person who has never been in the United States.

(b) Is it necessary under 8 U.S.C. 903 to allege and prove that a right or privilege as a national of the United States was claimed and that such right

or privilege was denied by a department or agency or executive official thereof upon the ground that appellants were not nationals of the United States.

(c) Is the action moot—Justiciable issue as to defendant.

2. *Were the lower Court's findings "clearly erroneous"?*

ARGUMENT.

1. JURISDICTION.

(a) **THE DISTRICT COURT DOES NOT HAVE JURISDICTION UNDER 8 U.S.C. 903 TO DECLARE NATIONALITY OF A FOREIGN BORN PERSON WHO HAS NEVER BEEN IN THE UNITED STATES.**

Appellants in their jurisdictional statement assert that the claim of right as citizens and the denial of that right by the American Consulate General at Hong Kong are pleaded in the complaint. The opening sentence states "Jurisdiction is conferred upon the Court below by Section 503 of the Nationality Act of 1940 (8 U.S.C. 903) * * *"

Section 903 became effective January 13, 1941, as part of the "*Nationality Act of 1940*", which was passed by Congress October 14, 1940 (54 Stat. 1137; 8 U.S.C. 907), the provisions of which are found in 8 U.S.C. 901 et seq. This Act, since repealed by Public Law 414, was, as stated in its title, *a national-ity statute and not an immigration statute*.

Immigration statutes refer to persons seeking to enter the United States and the requirements to be

met before they may enter this country, whereas the nationality statutes refer to citizenship in the United States. The enforcement of the immigration laws has been exclusively left to the Immigration and Naturalization Service, the only review by the Courts being that of habeas corpus. *Heikkila v. Barber*, 345 U.S. 229.

The purpose and intent of Sec. 903 (Sec. 503 of the Nationality Act of 1940) as revealed by the Congressional Record, Vol. 86, was to permit persons who had been born in the United States, or had acquired citizenship by naturalization, and who might suffer the denial of a right or privilege as a national while abroad, particularly as related to the new and more stringent expatriation sections of the Nationality Act, to have a day in Court.

Chapter IV, immediately preceding Section 503, lists various acts which raise a presumption of expatriation. Under Sec. 401, a national of the United States loses his United States citizenship by taking an oath of allegiance to a foreign state, accepting or performing duties of office for which only nationals of such state are eligible, etc. Sec. 402 creates certain presumptions of expatriation which may be overcome. If the Consul determines that a national has expatriated himself, there is no appeal. Such a person is entitled to a judicial hearing as provided in Sec. 903. A complaint for a declaratory judgment may be filed in the District of Columbia or the District in which such person claims previous residence in the

United States. Such hearing is directed to the specific issue of whether or not expatriation has occurred. The certificate of identity permits the person to enter the United States for the express purpose of prosecuting the action. There would be no question of the identity of the person making the claim to citizenship.

At the time the act was presented to the House (Vol. 86, Cong. Rec. p. 11944), Representative Dickstein gave the reason why the aforementioned statutory presumption of expatriation was included in Chapter IV.

“For many years *native* and *naturalized* citizens who have accumulated wealth through the opportunities afforded in the United States have gone abroad, purchased chateaux and fine homes in these foreign lands, have spent their money, and their only responsibility as citizens of the United States has been to register at certain intervals as citizens of the United States, but in times of stress have demanded the protection as citizens of the United States.

“There are others who through accident of birth and circumstances have been *born in the United States* of alien parents yet can claim citizenship and return at any time regardless of character or political theories or beliefs that are un-American and a danger to the country.

“Not only these alien Americans but others who now are able to claim citizenship will be definitely expatriated. * * *” (Emphasis ours.)

Section 503 in its present form was not a part of the original bill which was passed by the House Septem-

ber 11, 1940. The provision which later became Section 503 was first introduced as an amendment by Senator Schwollenbach at the time the bill was reported out of the Senate Committee. (Amendment 405.) The amended Act passed the Senate September 30, 1940. The House disagreed with the Senate amendment and a joint conference was held by a committee appointed by both Houses. It was reported out of this committee on October 4, 1940, and a short debate ensued on the floor of the House. On October 6, 1940, the House having receded from its disagreement to Senate Amendment 405 (Sec. 503), the Act was passed by the House. The Act adopted contains Amendment 5, Section 503, in its present form.

The following is quoted from the discussion in the House prior to the enactment of the Nationality Act and is found in Volume 86, Part 12, pp. 13247 and 13248 of the Congressional Record:

“That Amendment is for this purpose: where our manufacturers send agents through this country and they may have to remain five, ten or fifteen years in a foreign country we have to give them certain rights to come back.”

Representative Jenkins then continues:

“Mr. Jenkins: * * * What you are saying in this amendment is that a man who has never been in the United States at all but who claims he is a national either because his parents were or on some other ground but is not in fact a national can make application in our courts to have tested the question of whether he is a national. But suppose he wants to be admitted into this country to

do something not for the best interests of the country he can claim his day in court.

“Certainly we should not protect him as we would a boy who became a soldier. What is there in the bill to prevent the abuse of this privilege by a man who puts up a plausible claim to being what he in fact is not? * * *.

“Mr. Rees. I think I can answer the gentleman briefly. Let me call his attention to the fact that he seems to be discussing aliens. We are not talking about aliens.

“Mr. Jenkins. I am afraid the gentleman is wrong about that. I am talking about the case of a man who is not a national but who claims to be a national and who makes a showing of establishing that he is a national of this country. What have you in the bill to put up the bars against such a fellow?

“Mr. Rees. The gentleman from Ohio being familiar with these nationality laws knows that anyone who is a citizen who goes abroad can come back into the United States anytime he wants to no matter what he has done while abroad just so he has not done one thing, lost his citizenship.

“He may even have committed a crime just so he has not in some way expatriated himself as a citizen of this country. That is the present law. He does not have to bother about this process. *He can come back* to the United States and claim the protection of the laws here or the protection of our government while abroad. *Under this code we have provided certain restrictions in that situation and one of the most important is that the man who claims dual citizenship and who does not make the claim within a two-year or 90-day period after*

this bill becomes law that person has the burden of proof. Heretofore there was no burden at all. Now he loses his citizenship if he does not come into the United States within two years after this bill passes and maintain his citizenship. He is out otherwise. Except also he has two years after he reaches the age of 21.

*“Mr. Jenkins. We are not very far apart on this. * * * We should make our immigration laws fair toward the men and women who is deserving but we cannot be too strict toward the imposters and those who would undermine our government * * * .*

*“Mr. Rees. * * * In this Act we put the burden of proof upon that individual (presumed expatriate) to show that he is a citizen or a national of the United States. Along with that we have guarded the thing further. After placing the power and authority in the hands of the State Department we give him as I tried to explain a few minutes ago a day in court. The other way he can come back into the United States regardless of what we may say about it because he is still a citizen and entitled to our protection no matter how long he may have been abroad.” (Emphasis and parens ours.)*

It appears from the foregoing that Representative Jenkins had in mind the possibility of a false claim to citizenship being made and the strict proof that should be required. Mr. Rees passed this question by stating that the Act was only concerned with citizens. Thus the conclusion seems well founded that Section 503 was intended to apply only to those individuals whose

citizenship was unquestioned but against whom a presumption of expatriation had arisen under Sections 401-404. (8 U.S.C. 801-804.)

The essential requisite in invoking Section 903 is that the individual concerned must be denied some right or privilege as a national of the United States *upon the ground that he is not (no longer) a national of the United States.*

Clark v. Inouye, 175 F.2d 740, 742 (CA-9 1949) ;

Lee Hung, Lee Siu and Lee Jam v. Acheson 103 F. Supp. 35 (Dec. Jan. 28, 1952) ;

Fong Nai Sun et al v. Dulles D.C.S.D. (unreported) Central Div., Calif. July 13, 1953.

In *Dong Chew, et al v. Dulles*, No. 32093, D.C.N.D. California, decided May 21, 1953, Judge Murphy stated:

“Invocation of 8 U.S.C. 903 is predicated upon allegation that a purported national’s rights have been denied on the ground *that he is not a national of the United States.*”

Prior to the effective date of Public Law 414 (December 24, 1952) no one in the United States Department of State had authority to make a determination of nationality. Under 8 U.S.C. 901 a diplomatic or consular officer could issue a “Certificate of Loss of Nationality” to persons who may have lost their United States citizenship by expatriation.

Authority to determine nationality not having been invested in the Secretary of State, or his diplomatic and consular officers, the only certification the Consul

at Hong Kong could have made with regard to the United States nationality of any person appearing before him was that such person was *no longer* a national because of expatriation. The meaning of the word "not" in the portion of 903 which reads "*ground that they are not nationals*" is clearly "no longer." Appellants contend that the refusal of the Consul to issue a United States passport is a denial of a right and privilege of a national on the ground that the person seeking such passport is not a national. The contention is without merit. A passport is *not evidence of citizenship*.

Urtetiqui v. D'Arcy, 34 U.S. 692;

In re Gee Hop, 71 F. 274 (D.C.N.D. Calif. 1895);

Edsell v. Mark, 179 Fed. 292 (C.A. 9);

Miller v. Sinjen, 289 F. 388 (C.A. 8) (1923);

Lee Pong Tai v. Acheson, 104 F. Supp. 503 (E.D. Penn. 1952);

Scott v. McGrath, 104 F. Supp. 267 (E.D. N.Y. 1952).

A passport is issued only in the discretion of the Secretary of State,

Perkins v. Elg, 307 U.S. 325

and is generally directed to a foreign state for the purpose of protecting the holder of the passport. See cases cited above. Also *U.S. v. Browder*, 312 U.S. 335 (1941).

In *Blumen v. Haff* (1935) 78 F.2d 833, this circuit, Judges Wilbur, Garrecht and Denman presiding, found that the presentation of a Polish passport to im-

migration was a declaration or admission on the holder's part of Polish citizenship. In so holding, this court distinguished the use of a foreign passport from that of a United States passport, and then cited the *Urtetiqui*, *Gee Hop*, *Edsell* and *Miller* cases, stating: "It was held *that as against the government issuing the passport it was not evidence of the citizenship of the holder.*"

Miller v. Sinjen, supra, was a case in which a United States passport was denied by the Charge d'Affaires in Mexico City. The Eighth Circuit said, page 394:

"* * * a finding that *Plaintiff* had ceased to be a citizen of the United States was not necessary to action of the State Department in denying him a passport for the reason that the granting of a passport by the United States is and always has been a *discretionary* matter; and a passport when granted is not conclusive *nor is it even evidence that the person to whom it is granted is a citizen of the United States.*

Urtetiqui v. D'Arcy, 34 U.S. 692;

In re Gee Hop, 71 F. 274;

Edsell v. Mark, 179 F. 292, 23 Op. Atty. Gen. 509."

The reason why the appellants went to the American Consul in the first instance is found in the Presidential Proclamation of November 14, 1941, No. 2523 (55 Stat., 1696). The Passport Act of 1918, as amended (40 Stat. 559, as amended by Act of Congress approved June 21, 1941, *Public Law 114*, 77th Congress; Chap. 210, 1st Sess., 55 Stat. 252) authorized the Pres-

ident during time of war or national emergency to impose restrictions and prohibitions upon the departure from and entry of persons into the United States. The President of the United States, under said authority, by Presidential Proclamation No. 2523 did impose travel restrictions, which, in part, read:

“* * * No citizen of the United States or person who owes allegiance to the United States shall depart from or enter the United States * * * unless he bears a valid passport * * *”

Until the aforesaid Proclamation was made, it was unnecessary for persons claiming United States citizenship and residing abroad to obtain or have in their possession any documentation issued by a consular officer. The practice in Chinese cases was for the alleged father to prepare an affidavit of relationship and forward it to his purported son, who would then submit the document to the steamship agent. The determination of *admissibility* to the United States, *not nationality*, was made by the Immigration Service at the time of the applicant's arrival at the port of entry. In this procedure the consular officer played no part.

At the time of the passage of the Nationality Act of 1940, Presidential Proclamation No. 2523, of 1941, had obviously not been proclaimed. There was no statute, regulation, or proclamation then in effect which required persons claiming United States citizenship to make application to a consular officer abroad for documentation to come to the United States. There is no basis for considering that Congress had any intention

or even remotely contemplated any alteration of the well established administrative procedure for determining a derivative claim to United States citizenship made by persons who had never been in the United States. The Supreme Court had thoroughly reviewed the entire procedure and the rights of the claimant. There was no need for Congress to intervene.

The Law Relating to Immigration as It Existed at the Time of the Passage of Section 903.

Prior to the enactment of Section 903 of Title 8 U.S.C., a number of cases involving various aspects of exclusion and expulsion in immigration had been reviewed by the Supreme Court. These cases may be grouped as follows: (1) *Aliens* seeking to enter the United States for the first time; (2) *Aliens* who had been in the United States and upon seeking to return were *excluded* from admission by the Immigration Service; (3) *Aliens* in the United States whose expulsion had been ordered by a United States Commissioner and affirmed by the District Court; (4) *Aliens* whose expulsion had been ordered by the Immigration Service; (5) persons in the United States claiming United States citizenship whose expulsion was ordered; (6) persons seeking to re-enter the United States claiming United States citizenship by virtue of nativity, and who had been excluded by the Immigration Service; (7) persons who for the first time were seeking entry into the United States as citizens through derivation and who were denied admission to the United States by the Immigration Service.

The cases of persons falling within categories (1) and (2) above are considered and determined in:

Chai Chan Ping v. U.S., 130 U.S. 581;

Nishimura Ekiu v. U.S., 142 U.S. 651;

Lem Moon Sing v. U.S., 158 U.S. 538;

Tulsides v. Insular Collector, 268 U.S. 259.

Each of these cases was appealed to the Supreme Court after the dismissal of a petition for a writ of habeas corpus by the District Court had been affirmed by the Court of Appeals. The jurisdiction to review the administrative order by habeas corpus was established by the Supreme Court in

U.S. v. Jung Ah Lung, 124 U.S. 621.

The expression of the Supreme Court in *Nishimura Ekiu v. U. S.*, supra, page 659, that:

“It is an accepted maxim of International law that every sovereign nation has the power, as inherent in sovereignty, and essential to self preservation to forbid the entrance of foreigners within its dominion, or to admit them only in such cases and upon such conditions as it may see fit to prescribe.”

has been reaffirmed and asserted in the recent case of *Shaughnessy v. U. S. ex rel. Ignatz Mezei*, 345 U.S. 206 (March 16, 1953), wherein the Supreme Court at page 210 stated:

“Courts have long recognized the power to expel or exclude aliens as a fundamental sovereign attribute exercised by the Government’s political departments largely immune from judicial control.

* * * * *

“For purposes of the immigration laws, moreover, the legal incidents of an alien’s entry remain unaltered whether he has been here once before or not. He is an entering alien just the same, and may be excluded if unqualified for admission under existing immigration laws.”

In Groups 3 and 4 are those persons against whom *deportation* (expulsion) proceedings have been instituted—those who have had a hearing before a United States Commissioner pursuant to the Chinese Exclusion laws and those sought to be deported via administrative proceedings by Immigration.

With regard to the rights of these persons who were aliens, the United States Supreme Court in *Fong Yue Ting v. U. S.*, 149 U.S. 698, stated at page 713:

“The power to *exclude* or to *expel* aliens being a power affecting international relations, is vested in the *political* departments of the government and is to be regulated by treaty or by act of Congress and to be executed by the executive authority according to the regulations so established, except so far as the judicial department has been authorized by treaty or by statute, or is required by the paramount law of the Constitution, to intervene.”

Li Sing v. U. S., 180 U.S. 486;

Bugajewitz v. Adams, 228 U. S. 585;

Carlson v. Landon, 342 U. S. 524;

Harisiades v. Shaughnessy, 342 U.S. 580;

Shaughnessy v. U. S. ex rel. Ignatz Mezei,
supra.

Groups 5, 6 and 7 concern persons who at some time during the proceedings, administrative or judicial, *made claim to United States citizenship.*

Group 5 involved persons *in* the United States claiming United States citizenship, *ordered to be deported* after denial of such claim. The case of *Chan Bak Kan v. U. S.*, 186 U.S. 193, arose under the Chinese Exclusion Acts, and it was argued that the Commissioner who had ordered appellant deported had no jurisdiction because the claim of citizenship had been made. That proposition was disposed of by Chief Justice Fuller, who stated, at page 200:

“By the law the Chinese person must be adjudged unlawfully within the United States unless ‘he shall establish by affirmative proof, to the satisfaction of such justice, judge, or commissioner, his lawful right to remain in the United States.’ As applied to aliens there is no question of the validity of that provision, and the treaty, the legislation, and the circumstances considered, compliance with its requirements cannot be avoided by the mere assertion of citizenship. *The facts on which such a claim is rested must be made to appear, and the inestimable heritage of citizenship is not to be conceded to those who seek to avail themselves of it under pressure of a particular exigency, without being able to show that it was ever possessed.*” (Emphasis ours.)

See, also:

Ah How v. U. S., 193 U.S. 65.

Group 6 involves persons claiming United States citizenship seeking to re-enter the United States, whose entry was denied by the Immigration Service.

The Courts were *first* confronted with this question in *Quock Ting v. U. S.* (1891), 140 U.S. 417. In that case, the appellant, a Chinese, was denied entry into the United States, whereupon he applied for a writ alleging that the Chinese Exclusion laws did not apply to him and that he was illegally restrained of his liberty. The only question considered by the Supreme Court was whether the evidence below was sufficient to show that appellant was a citizen of the United States. The judgment of the Court below discharging the writ was affirmed.

It was not, however, until the case of *United States v. Sing Tuck* (1903), 194 U.S. 161, that the Supreme Court completely resolved the question of the authority of Immigration to determine the right of a person claiming United States citizenship to enter the United States. In that case Chinese persons came from China via Canada seeking admission to the United States, and at the border when questioned, by Immigration officers, gave their names, claimed birth in the United States, and would answer no further questions. Their claim to citizenship was denied, and no administrative appeal was taken. Thereafter, a petition for a writ of habeas corpus was filed and denied by the District Court, but reversed in the Circuit Court of Appeals on the ground that the parties were entitled to a judicial investigation. The Circuit Court of Appeals held

that the Act of 1894 should not be construed to submit the right of a native-born citizen of the United States to return hither to the final determination of executive officers. Mr. Justice Holmes, however, stated:

“We are of the opinion, however, that the words quoted (‘In every case where an alien is excluded * * * the decision of the appropriate immigration or customs officers * * * shall be final, unless reversed on appeal * * *’) apply to a decision on the question of citizenship * * *”

Further on in his opinion, Justice Holmes said:

“A mere allegation of citizenship is not enough. But before the courts can be called upon, the preliminary sifting process must be gone through with. Whether after that a further trial may be had we do not decide.”

See, also, *U. S. v. Ju Toy*, 198 U.S. 253 (1905), wherein Justice Holmes, at page 262, stated:

“It is established, as we have said, that the Act purports to make the decision of the Department final, whatever the ground on which the right to enter this country is claimed—as well when it is *citizenship* as when it is domicile and the belonging to a class *excepted from the exclusion acts*. *U. S. v. Sing Tuck*, 194 U.S. 161, 167; *Lem Moon Sing v. U. S.*, 158 U.S. 538, 546, 547.” (Emphasis ours.)

Tang Tun v. Edsell, 223 U.S. 673;

Kwock Jan Fat v. White, 253 U.S. 454.

Group 7, the last of the categories, involves persons who for the *first time* were seeking entry into the

United States claiming citizenship by derivation and who were refused admission to the United States by Immigration. This group involves citizenship pursuant to Section 1993 of the Revised Statutes. In almost every case, Section 1993 is the statute under which the claims to United States citizenship are made in the approximately 700 complaints filed by Chinese in the Northern District of California invoking Section 903 of Title 8 U.S.C. It is the statute involved in the instant case.

Although not falling squarely within the last category in that it involved *expulsion*, the case of *Ng Fung Ho v. White*, 259 U.S. 276 (1922), is of interest in that it was the first case decided by the United States Supreme Court in which a claim to United States citizenship by derivation (Section 1993, Revised Statutes) was made. Five Chinese persons were arrested as being illegally in the United States and thereafter applied for writs of habeas corpus. Ultimately one of the five was released, and the other four appealed to the Supreme Court. As to two of the appellants who made no claim to citizenship, the Supreme Court held the order of deportation valid. As to the other two appellants, who claimed to be foreign-born sons of a native-born citizen under Section 1993, and thus insisted that Congress was without power to authorize their deportation by executive order, Justice Brandeis stated:

“If at the time of arrest they had been in legal contemplation without the borders of the United States seeking entry, the mere fact that they

claimed to be citizens would not have entitled them under the Constitution to a judicial hearing. U. S. v. Ju Toy, 198 U.S. 253; Tang Tun v. Edsell, 223 U.S. 673."

Justice Brandeis then went on to hold that since Immigration had previously admitted appellants to the United States "as citizens" and that appellants had supported their claim by evidence sufficient if believed, to entitle them to a finding of citizenship, they were entitled to a *judicial trial de novo* of their claims. The case was then remanded to the District Court for further proceedings on the question of citizenship.

It was not until 1927 that the Supreme Court of the United States had before it a case in which a Chinese who had never resided in the United States claimed citizenship by derivation under Section 1993. Such claim had been denied by Immigration and he was excluded. In that case, *Quon Quon Poy v. Johnson*, 273 U.S. 352, Mr. Justice Sanford said, at page 358:

"It is clear, however, in the light of the previous decisions of this court, that when the petitioner, *who had never resided in the United States, presented himself at its border for admission, the mere fact that he claimed to be a citizen did not entitle him under the Constitution to a judicial hearing*; and that unless it appeared that the Departmental officers to whom Congress had entrusted the decision of his claim, had denied him an opportunity to establish his citizenship, at a

fair hearing, or acted in some unlawful or improper way or abused their discretion, their finding upon the question of citizenship was conclusive and not subject to review, and it was the duty of the court to dismiss the writ of habeas corpus without proceeding further. U. S. v. Sing Tuck, 194 U.S. 161, 168; U. S. v. Ju Toy, 198 U.S. 253, 263; Chin Yow v. U. S., 208 U.S. 8, 11; Tang Tun v. Edsell, 223 U.S. 673, 675; and Ng Fung Ho v. White, 259 U.S. 276, 282." (Emphasis ours.)

The decision of the Supreme Court in *Quon Quon Poy*, insofar as it related to the rights of persons seeking entry into the United States as derivative citizens, was the state of the law as it existed at the time of the passage of the Nationality Act of 1940. Persons seeking admission to the United States as citizens thereof and who had never resided therein, *were not entitled to a judicial hearing*.

Although Title 28, U.S.C. 400 (28 U.S.C. 2201) was in effect from March 3, 1911, it was not until 1938 and the Supreme Court decision of *Perkins v. Elg*, 307 U.S. 325, that it was clear that suit for declaratory judgment as to citizenship could be maintained under that section.

Marie Elizabeth Elg was born in Brooklyn, New York, on October 2, 1907. This fact was undisputed. In 1911 her mother took her to Sweden where she continued to reside until September 7, 1949. In 1929 within eight months after attaining majority, she obtained an American passport, returned to the United

States and was admitted as a citizen. Her residence in the United States continued thereafter. In November, 1934 her father voluntarily expatriated himself in Sweden. In April, 1935 Miss Elg was notified by the Department of Labor that she was an alien illegally in the United States, and threatened with deportation. In July, 1936 she applied for an American passport and was refused by the Secretary of State upon the sole ground that she was not a citizen of the United States, whereupon she commenced suit.

The *Elg* case is clearly within the 5th group of cases. The only difference is that the resort to the declaratory judgment suit under 28 U.S.C. 400 permitted a judicial determination prior to arrest under an order of deportation.

Chin Yow v. U. S., 208 U.S. 8;

Ng Fung Ho v. White, 259 U.S. 276.

The Court of Appeals' decision should be read to make this fact clear.

While the record of Congressional hearings and proceedings as to Section 903 do not so disclose, it would appear that *Perkins v. Elg* was an important influence in that Congress by adding Section 903 specifically extended the declaratory judgment jurisdiction to the District Court in the cases included within Sections 401-404 of the Nationality Act—in other words, where a right or privilege is denied on the ground a national is *no longer* a national.

The state of the law in 1940 was, therefore, (1) a resident of the United States in the United States

could file an action for declaratory judgment for a determination of citizenship, *Perkins v. Elg*; (2) a person who had never been in the United States, who claimed derivative citizenship, was *not* entitled to a judicial hearing, *Quon Quon Poy v. Johnson*, *supra*.

The effect of Section 503 of the Nationality Act of 1940 (8 U.S.C. 903) was to specifically extend the jurisdiction of the District Court to entertain a declaratory judgment suit by persons who were not in the United States but who *had been residents* of the United States and to permit the suit to be filed in the District of their previous residence or the District of Columbia, as they choose, and who were denied a right or privilege on the ground that they were no longer nationals, i.e., expatriated.

On March 9, 1948 the Court of Appeals for the Second Circuit in *U. S. ex rel. Medieros v. Watkin*, 166 F. 2d 897, held that one who has returned to the United States as a *repatriate* but who was ordered excluded by immigration authorities on the ground that he was an alien was not entitled to judicial determination of his claim of United States citizenship notwithstanding evidence of *prior residence* in the United States. The Court extensively reviewed the Supreme Court decision cited above.

On October 18, 1948 the Court of Appeals for the Ninth Circuit in *Carmichael v. Delaney*, 170 F. 2d 239, Judges Denman, Healy and Orr constituting the Court, Judge Healy writing the opinion, after reviewing the Supreme Court decisions and the *Medieros v.*

Watkin case of the Second Circuit did not question the rule of the *Watkin* case but held that the rule did not apply to one who is a resident of the United States. At page 244:

“We do not question the rule or suggest the need or desirability of departing from it. Our thought is only that it cannot constitutionally be applied to one who is a resident of the United States. As to him the due process of law guaranteed by the Fifth Amendment would seem to require that his substantially appealed claim of citizenship be accorded a judicial trial.”

The Ninth Circuit found that Delaney had made *no* entry into the United States, that he was presently a resident, and therefore was not subject to exclusion. Deportation (expulsion proceedings) was the administrative process under *Ng Fung Ho v. White*, *Chin Yow v. U. S.*, and *Kwock Jan Fat v. White* (all *supra*). Delaney was entitled to a judicial hearing on the claim of citizenship.

The next case in the Second Circuit was *U. S. ex rel. Chu Leung v. Shaughnessy*, 176 F. 2d 249, decided July 19, 1949. A Chinese who had long residence in the United States, returned to the United States in 1948. He held a United States passport and claimed citizenship. After a Board of Special Inquiry hearing he was ordered excluded as an alien by birth, not in possession of an unexpired immigration visa. The opinion, page 250, cites *Carmichael v. Delaney*, of the Ninth Circuit, as holding that a *resident* of the United

States who is excluded at the border is entitled to a judicial trial of his claim to be a citizen. The Court mistakenly assumed that Delaney was making an entry. There was no exclusion as he was a resident who was residing in the United States.

The following is quoted from page 250:

“The considered opinion of this Court in the *Medieros* case in 1948 refused to make such an exception on the grounds of residence. We adhere to that full and recent expression and we do so without sharing the reluctance expressed by Judge Kaufman.

“The criticism of this general rule in the exclusion cases, which rule was first adopted in *U. S. v. Ju Toy*, 198 U.S. 253, 25 S.Ct. 644, 49 L.Ed. 1040, loses its force when considered in the light of the provision for court test of nationality contained in the Nationality Act of 1940, §503, 54 Stat. 1171, 8 U.S.C.A. §903. The Act as interpreted by the courts provides for a judicial declaration of the U. S. ‘Nationality’ or ‘citizenship’ of persons claiming rights based upon such nationality or citizenship. *Bauer v. Clark*, 7 Cir., 161 F. 2d 397; *Brassert v. Biddle*, 2 Cir., 148 F.2d 134; *Chin Wing Dong v. Clark*, D.C. Wash., 76 F. Supp. 648; *Attorney General v. Ricketts*, 9 Cir., 165 F.2d 193; *Doreau v. Marshall*, 3 Cir., 170 F.2d 721. This avenue for judicial determination of his citizenship is open to the relator here.”

Bauer v. Clark involved a naturalized citizen who allegedly had forfeited his rights as a citizen by taking oath of allegiance to the German Reich.

Brassert v. Biddle involved a naturalized citizenship claim and a denial thereof on a reentry.

Chin Wing Dong v. Clark involved the denial of a certificate of derivative citizenship after application made to the Commission under 8 U.S.C.A. 739.

Attorney General v. Ricketts was an expatriation case.

Doreau v. Marshall was also an expatriation case.

In all these cases there was a bona fide residence in the United States. All the cases except *Chin Wing Dong* involved the situation of a national being no longer a national because of expatriation. In *Chin Wing Dong* jurisdiction under 903 is not considered to have been proper.

The Second Circuit, in *Chu Leung*, was in error in suggesting jurisdiction under Section 903.

Ng Fung Ho v. White, supra, should have been squared away with *U. S. v. Watkin* on the question of judicial hearing.

In *Mah Ying Og v. Clark*, 81 F. Supp., November 22, 1948, District of Columbia, Judge Holtzoff in an action for declaratory judgment under 8 U.S.C. 903 denied a motion for summary judgment which had been filed, on the ground that the action of the administrative agency and the subsequent decision of the Ninth Circuit Court of Appeals in habeas corpus proceedings was res judicata on the question of citizenship. The judge held, "it is clear that the statute contemplates a trial de novo of the issue of citizen-

ship and not merely a review of the administrative action." However, the opinion states that Mah Ying Og claimed *he was born in the United States*. If he did not receive such hearing, then the 903 action would be proper. If, as is indicated by the Court of Appeals' decision in 187 F. 2d 199, Mah Ying Og *was not a native-born claimant*, but a nonresident claimant, then the Court is clearly wrong in upholding jurisdiction under Section 903. The case of *Chu Leung v. Shaughnessy*, of the Second Circuit, 176 F. 2d 729, is cited, and the language relating to Section 503 of the Nationality Act is quoted, but out of context with relation to the *Watkin* case and *Carmichael v. Delaney*.

Gan Seow Tung v. Clark, 83 F. Supp. 482, March 18, 1949, a decision of Judge Hall of the Southern District of California, is also cited by the Court of Appeals in *Mah Ying Og* as authority for a trial *de novo*. But Judge Hall cites Judge Holtzoff's decision in *Mah Ying Og* (footnote 3) as authority for a trial *de novo*. The judgment in this case after trial was for the defendant. No appeal was taken so the question was explored no further.

In October 1949 the complaint in *Look Yun Lin v. Acheson* No. 28,984, was filed in the Northern District of California. Look Yun Lin is a Chinese person claiming derivative citizenship who had never been in the United States. At the time the complaint was filed he was in China. A motion to dismiss was filed on the ground that "this action does not fall within

the purpose and intent of the said Section 503 of the Nationality Act of 1940.” In an opinion reported at 87 F. Supp. 463, Judge Erskine upheld jurisdiction, but stated:

“It is probably true that the general purpose behind this Nationality Act of 1940 was to codify existing law, and any novel features thereof were probably *intended to strengthen rather than loosen* naturalization and immigration laws. Therefore, the basic issue is whether a general intent of Congress to tighten the law is overridden by the inclusion in the law of a new remedy open to ‘any person’ aggrieved in the manner designated. Two opposing concepts are involved. On the one hand there is the desire to protect the rights of any American citizen; on the other hand is the desire to protect the courts from an avalanche of declaratory suits by parties *fraudulently alleging American nationality*. The proper balancing of these two elements can best be served through a careful scrutiny of the cases as they arise, to insure that there is *prima facie* a bona fide claim of citizenship. * * *”

The motion to dismiss was denied. The order denying the motion was not an appealable order and as the case has not as yet come to trial there has been no opportunity to raise the question on appeal.

No further reported discussion concerning the availability of the provisions of Section 903 to persons who had never been in the United States is found until the matter was discussed at length by Judge Goodman in *Ly Shew v. Acheson*, 110 Fed. Supp. 50.

In the *Ly Shew* case Judge Goodman, while not resting his decision on his interpretation of Section 903, suggested that that section applied only to cases of expatriation.

The *Ly Shew* and *Look Yun Lin* cases, *supra*, are then, the only reported expressions of Courts concerning the availability of Section 903 to cases where the person has never resided in the United States. But see *Savorgnan v. U. S.*, 338 U.S. 491.

The case of *Acheson v. Yee King Gee*, 184 F. 2d 382, was decided by this Court on October 4, 1950 after having been submitted to Judges Healy, Bone and Pope. Judge Healy wrote the opinion. There was no dispute as to the facts. Yee King Gee was born in China. His father was an American citizen. The American Consul General at Canton "declined to recognize" his nationality on the ground that the father was physically present in the United States but eight years and four months prior to appellee's birth. A certificate of identity was issued which permitted him to come to the United States. Two propositions were urged on appeal: (1) that the District Court was without jurisdiction to entertain the suit, and (2) that the father had not resided in the United States for the required ten years prior to appellee's birth.

On the first point this Court considered the question one of *venue* and not jurisdiction as the contention was that the only Court in which the action might be brought was the District Court for the District of

Columbia; the essential issue of the jurisdiction of any District Court was not squarely presented. The opinion, however, went on to hold the allegation "claims his permanent residence as Seattle, Washington, where his father resides" as sufficient

"to invoke the jurisdiction of the court below, and the court found as a fact that the claim of Seattle residence was made in good faith and upon substantial basis. It is to be noted that the statute permits the bringing of the suit regardless of whether the plaintiff is within the United States or abroad. In the circumstances in evidence the minor's claim to permanent residence where his father lived was neither irrational nor unfounded."

In view of the fact that there was no dispute as to the identity of the plaintiff, the citizenship of the father, and the relationship of plaintiff to the father, this Court was not apprised of the import of the question of jurisdiction in all the cases in which such facts were disputed. The case of *Binderings v. Pathe Exchange*, 263 U.S. 291, was cited in the opinion, Note 2, on page 384, in support of the jurisdictional holding. The following sentence is quoted from page 305. "Jurisdiction is the power to decide a justiciable controversy, and includes questions of law as well as of fact."

One additional factor to be considered by the Court as related to the problem is the significance of the jurisdictional proclamation of November 14, 1941, 55 Stat. 1696, the pertinent portion of which has been previously quoted.

The necessity of having proper documentation to come to the United States was established by the proclamation. Prior thereto all Chinese and other claimants of American citizenship by derivation came to the portals of the United States without any documentation. Their claim was heard and determined administratively by the Immigration Service or its predecessors. Review was accorded thereafter by habeas corpus or judicial hearing as previously discussed, out of which came the long line of Supreme Court decisions and particularly *Quon Quon Poy v. Johnson*, supra, also *U. S. ex rel. Madieros v. Watkins* and *Carmichael v. Delaney*.

The same need for documentation under the proclamation posed a tremendous problem specifically upon the American Consul at Hong Kong. He was literally deluged with applications to come to the United States by persons who claimed they had fathers who were American citizens. The Consul obviously had no means to know anything about these persons. His alleged failure to grant such documentation forthwith resulted in the filing of a complaint in the District Court under Sec. 903. Up to the time of the effective date of the Immigration and Nationality Act of 1952, Public Law 414, over 700 cases had been filed in the District Court for the Southern District of California. The present case before this Court is typical. Appellant has not considered the responsibility or duty of the Consul under the proclamation as of sufficient importance to warrant any evidence in the record as to what action was taken by him.

We may well assume that appellant, along with an indeterminate number of similar claimants, made an application. The Consul said: "I don't know who you are", and declined to grant the documentation. The suit was then filed and appellant was permitted to come forward by a certificate of identity. The Secretary of State is the defendant in the action. He had no knowledge of the identity or the claim of the appellant, at the time of the application, was no better informed at the so-called trial, and has gained nothing since. The trial Court is placed in no better position. It is difficult to conceive how a "justiciable controversy" could possibly have arisen out of the responsibility imposed upon the American Consul at Hong Kong, or how any Court could conclude that jurisdiction was invoked under Title 8 U.S.C. 903 to make a judicial determination of the alleged claim as presented by this appellant to the Court below.

On the jurisdiction question it is therefore submitted:

(1) There was no jurisdiction under Sec. 903 of action in the case from the beginning.

(2) There was no jurisdiction under Sec. 903 because there was no denial by the defendant within any possible meaning of the statute.

(3) There was no jurisdiction because the appellant had never resided in the United States and therefore had no claim to residence upon which to file suit either in the District Court of a claimed actual residence or the District of Columbia.

(4) There was no jurisdiction because, even assuming that the Consul did deny documentation to the United States at the inception of the claim, the granting of the certificate of identity removed the denial and permitted the appellant to come to the United States, and his claim should have been processed through the Immigration Service.

2. THE FINDINGS OF FACT, CONCLUSIONS OF LAW AND JUDGMENT ARE CORRECT.

The review of the cases and the discussion of the law which have preceded under the heading *Jurisdiction*, have established the framework within which to consider the responsibility imposed upon the trial Court in this case, the similar cases presently pending on appeal, as well as the 700 odd cases still pending below. Assuming the jurisdiction, just what is the trial Court required to determine?

The appellants are Chinese persons who have lived their entire lives in China, probably somewhere in Kwantung Province, prior to coming to the United States. They speak a Chinese dialect, their culture and such education as they may have had is Chinese. On a day they probably went to the American Consul armed with a paper, presumably an application for documentation to come to the United States. The record does not disclose these facts but we think they may be fairly presumed. They claimed to be American citizens born of an American citizen father.

The Consul undoubtedly said—have you any evidence to establish your identity and your claim. Such not being forthcoming, the Consul declined to issue the requested documentation. The instant action was then filed naming the Secretary of State as the defendant, and alleging among other things that “their application for documentation had been denied”; “that the refusal of the American Consulate General at Hong Kong to permit the said (appellants) to proceed to a port of entry in the United States *for the purpose of having their admissibility determined by the administrative agency charged with such duty* is an arbitrary and unreasonable refusal or denial of a right or privilege of a United States National.” (Tr. 6.) (Italics ours.)

After notice of the filing of the suit and upon request, the said American Consul at Hong Kong must have issued documentation permitting these appellants to come to the United States. This conclusion is drawn from the fact that they are here. Again we ask—what is the trial Court to determine? The Secretary of State knew nothing about the appellants, the Department of Justice certainly knew nothing about them. The area in which an investigation might have been conducted is outside the sovereign boundaries of the United States and in nowise subject to any investigation.

Plaintiffs proceeded on the theory that the Court had jurisdiction and that the judge could and should determine that the plaintiffs are “Nationals” of the United States. The defendant offered no evidence.

Appellants at page 28 of their brief concede that the burden of proof was on appellants: "We are not disposed to question where the burden of proof lies in these cases, nor whether it shifts at any stage of the proof." A very gracious concession, certainly entirely consistent with *Chan Bak Kan v. U. S.*, 186 U.S. 193, *Quon Quon Poy v. Johnson*, supra, and every Supreme Court, Court of Appeals, and District Court decision on the subject.

At the conclusion of the so-called trial, the judge by his findings has said "I don't know who you are. The relief prayed for is denied."

Appellants now before this Court have cited numerous cases on such proposition as "A finding of fact is clearly erroneous if it is against the clear weight of the evidence"; "or if it is against the positive uncontradicted and unimpeached testimony"; "unimpeached and uncontradicted testimony cannot be disregarded."

In support of their propositions are such cases as *U. S. v. U. S. Gypsum Co.*, 333 U.S. 364; *Chesapeake and Ohio Ry. Co. v. Martin*, 283 U.S. 209, and others.

We then find a group of specially selected cases in the Ninth Circuit considered on appeal in habeas corpus proceedings seeking review of the administrative proceedings in immigration. We will endeavor to place these cases into context with all the Supreme Court and Court of Appeals decisions.

Prior to the enactment of the exclusion laws in 1882 various labor interests were instrumental in

bringing cheap Chinese "coolie" labor to the United States, but thereafter this source of cheap labor ceased. However, the Exclusion Act was circumvented and for a number of years almost nullified when the Chinese discovered that it was possible to establish in State Courts the birth of anyone anywhere in the United States. The procedure was to have two witnesses swear in Court that they knew a person had been born at a certain place and date, the child of certain parents. Subsequent to such establishment of a birth record, a person claiming such record would arrive in the United States and by virtue of filing a petition for writ of habeas corpus, *U. S. v. Jung Ah Lung*, supra, and *Chin Yow v. U. S.*, supra, have the Courts determine their citizenship. Thus, from 1883 to 1904, thousands of Chinese men arriving in the United States, who freely admitted to the Collector of Customs (then responsible for immigration inspection) that they were *born in China* (the ship's manifests proving these facts are still in existence at Immigration), after being refused admission by the Collector, were brought into United States Courts by way of petition for writ of habeas corpus and were then landed by the Courts as native born citizens of the United States. The Courts became so crowded with such proceedings that referees were appointed to dispose of them. The fraudulent nature of these cases was brought to official notice and the practice stopped through the case of *U. S. v. Ju Toy*, 198 U.S. 253 (1905). In that case, the Supreme Court held that Ju Toy was not entitled to a judicial hear-

ing of his claim to United States citizenship and that as an excluded person he was not *within* the United States.

However, even prior to the *Ju Toy* decision, the Supreme Court was aware of the problem confronting the administrative agencies and the Courts in determining the right to enter of one claiming United States citizenship where that person was arriving from a foreign country in which no vital statistics were kept and investigations by United States officials were impossible.

In *Quock Ting v. U. S.*, 140 U.S. 417, decided 1891, the Supreme Court considered for the first time the rights of a Chinese claiming to be a *native* born citizen of the United States who had been excluded from admission to the United States. The facts were: Quock Ting claimed birth in San Francisco and to have resided therein to the age of ten. He returned to China with his mother where he remained to the age of sixteen. In February, 1888 he applied for admission to the United States at the Port of San Francisco and was denied. At the hearing in the Court below, his alleged father testified in behalf of petitioner and produced a so-called store book in which there was an entry of passage money paid for the boy and his mother. In discussing the testimony and evidence, Justice Field stated at page 419:

“The testimony amounted to very little; indeed it was of no force or weight whatever. The particularity and positiveness with which he stated the place of his birth in San Francisco was evi-

dently the *result of instruction* for his examination on this proceeding, and not a statement of what he had learned from his parents in years past. * * *”

Throughout the years the Courts of the United States have recognized that the effect of granting the petition for writ of habeas corpus in the cases described above was the granting of United States citizenship.

In *Chan Bak Kan v. U. S.*, 186 U.S. 193 (1902) the Supreme Court stated:

“By the law the Chinese person must be adjudged unlawfully within the United States unless he ‘shall establish by affirmative proof, to the satisfaction of such justice, judge, or commissioner, his lawful right to remain in the United States.’ As applied to aliens there is no question of the validity of that provision, and the treaty, the legislation, and the circumstances considered, compliance with its requirements cannot be avoided by the mere assertion of citizenship. *The facts on which such a claim is rested must be made to appear. And the inestimable heritage of citizenship is not to be conceded to those who seek to avail themselves of it under pressure of a particular exigency, without being able to show that it was ever possessed.*” (Emphasis ours.)

And in *U. S. v. Manzi*, 276 U.S. 463 (April 9, 1928), the Court said:

“Citizenship is a high privilege, and when doubts exist concerning a grant of it, generally at least, they should be resolved in favor of the United States and against the claimant.”

The expression of Mr. Justice Clarke in *Kwock Jan Fat v. White*, 253 U.S. 454, at p. 464, that

“It is better that many Chinese immigrants should be improperly admitted than that one *natural* born citizen of the United States should be permanently excluded from his country”

is often quoted by those whose application for admission to the United States has been denied. However, the words take on added significance as to the *value* of citizenship when one considers that the statement was made concerning the rights of one who had previously been in the United States and had been recognized as a *native* born citizen of the United States. And the words of Justice Brandeis in *Ng Fung Ho v. White*, 259 U.S. 276, wherein deportation of one who claimed United States citizenship was sought, that:

“* * * may result also in loss of both property and life, or *all that makes life worth living*,”

aptly expresses the value of United States citizenship!

Recognizing the limitations of the Sovereign Government of the United States to properly determine and evaluate the claims of Chinese persons to the right to enter the United States, either as aliens or as citizens thereof, the courts have placed the burden of proving admissibility on the person seeking entry. With regard to the testimony offered by these people, in the cases *involving aliens* the courts have stated:

“And in accepting the adjudication [of Immigration Officers], we do not share the alarm of

counsel * * * We think * * * it will leave the administration of the law where the law intends it should be left; *to the attention of officers made alert to attempts of evasion of it and instructed by experience of the fabrications which will be made to accomplish evasion.*” (Emphasis ours.)

Tulsidas v. Insular Collector, 262 U.S. 259.

Most of the *expressions* of the courts refer, however, to claims of citizenship and the views of the Supreme Court in *Quock Ting v. U. S.*, *supra*, and *Chan Bak Kan v. U. S.*, *supra*, have previously been stated.

It was not long after the Chinese Exclusion Act of 1882 that claims to citizenship by Chinese persons were asserted in the Ninth Circuit.

Gee Fook Sing v. U. S., 49 F. 146, was a decision of Judge Hanford in January, 1892. Appellant, a Chinese, was prohibited from landing; claimed United States citizenship by birth. Although a petition for habeas corpus was filed, evidence was taken before a commissioner on the issue of citizenship. (Act of May 6, 1882, 23 Stat. 58, as amended and added by Act of July 15, 1884, 23 Stat. 115.) At page 148, Judge Hanford said:

“The evidence in the case shows that it is an admitted fact that the appellant is of Chinese parentage. His appearance and language proves that he is in all respects, save, possibly, in the one matter of his legal citizenship, a Chinaman, and not an American. * * * Under the circumstances stated by him, but little, if any, credence should be given to his own evidence as to the place of his

birth, and he is corroborated on this vital point only by the testimony of other Chinese persons, who confessedly have seen him but a few times, and can give only hearsay evidence.”

And in *Lem Hing Dun v. U. S.*, 49 Fed. 148 (CA-9):

“The evidence is not sufficient to make a case in favor of appellant so clear as to warrant this court in reversing the District Court upon the facts. * * *The case is such as *any imposter* could easily make.”

The next case of importance is *Lee Sing Far v. U. S.*, 94 Fed. 834 (CA-9 1899). Appellant here claimed to be a *native* born citizen. She had been in China with her mother for 17 years. The right to land was denied by the Collector of the Port. Upon an application for habeas corpus the matter was referred to a special referee and commissioner. He heard the testimony and made his report thereon to the District Court, recommending that judgment of remand be entered. The report of the referee was adopted by the Court and judgment entered accordingly. The appeal was from the judgment. Judges Gilbert, Ross and Hawley comprised the Court of Appeals. Judge Hawley wrote the opinion. At the beginning of his consideration of the case, at p. 835, the judge commented on a not uncommon practice in the Chinese cases, “for counsel not to take any exception” to the report of the referee, then after entry of the judgment by the District Court to substitute attorneys who then come into Court claiming inadvertence, oversight and neglect and asked for a rehearing which if granted enabled the applicant to

supply the "missing link" in the evidence. "Such procedure * * * does not commend itself to our favor." At page 836 the following is quoted:

"The question which we are called upon to decide is not whether there was any evidence tending to establish the fact that appellant was born in the United States, *but is whether the evidence is so clear and satisfactory* upon that point as to authorize this Court to say that the Court erred in refusing her to land, and in entering judgment that she be remanded." (Emphasis ours.)

And at page 837:

"It therefore devolves upon her to prove to the satisfaction of the court that she was born in this country. It does not necessarily follow that because four witnesses have testified positively that she was born in San Francisco there being no witnesses to the contrary, their statements upon this question must be accepted as true. If such a rule were adopted and followed, there would be no more Chinese remanded in such cases. It is safe to say that the United States is powerless to make any proof in any case as to the place of birth of Chinese children. In the very nature of the case it would as a general rule be impossible to do so. The only protection to the government in the enforcement of the Exclusion Act in this character of case lies *in the cross examination of each* witness, on behalf of the petitioner whereby the crucial test of his credibility may be applied."

The Court is reminded that Lee Sing Far claimed *native* birth in the United States and that although the case came before the District Court on habeas corpus,

a special hearing was held on the question of citizenship by a commissioner appointed by the Court. The lack of power on the part of the United States to make any proof in *any* case as to place of birth of Chinese children has been emphasized. If such were true as to Chinese children born *in* the United States it was even more so where the Chinese was born in China. In any event, there is no burden upon the United States or its officers and agents to make *any* proof. The burden is upon the claimant, and adequate evidence of a clear and convincing effect, regardless of the astuteness of any cross examining ability of the representative of the defense, should be required. No case has been found which overruled or criticized the opinion in *Lee Sing Far*. It was reaffirmed by the same judges on May 13, 1901, in *Woey Ho v. U.S.*, 109 Fed. 888, another case of claimed native birth in which no testimony was introduced by the Government. See also the following:

Alien deportation:

Quong Sue v. U.S., 116 Fed. 316 (CA-9 1902);

Native birth deportation:

U.S. v. Leung Sam (WD NY 1902), 114 Fed. 702;

The Dauntless (CA-9 1904), 129 Fed. 715;

Native born deportation:

Lee Yuen Sue v. U.S. (CA-9 1906), 146 Fed. 670;

Chin Hung v. U.S. (CA-7 1917), 240 Fed. 341;

Yee Chung v. U.S. (CA-9 1917), 243 Fed. 126.

In 1904 Justice Holmes of the Supreme Court wrote opinions in *Ah How v. U.S.*, 193 U.S. 65; *U.S. v. Sing Tuck*, 194 U.S. 161, and *U.S. v. Ju Toy*, 198 U.S. 253.

Ah How claimed *native* birth and was ordered deported by way of expulsion.

Sing Tuck claimed *native* birth and was ordered deported by way of exclusion.

Ju Toy claimed native birth and was *excluded*.

In *Ah How*, Justice Holmes held that the Act of April 29, 1902, did not repeal §3 of the Act of May 5, 1892, putting the burden of proving the right to *remain* in the United States on the Chinese. As an expulsion case the burden would ordinarily have been on the government.

In *Sing Tuck*, Chinese persons came from China via Canada, seeking admission and claiming birth *in* the United States. The dismissal of the writ by the District Court without a hearing was reversed by the Circuit Court of Appeals on the ground that the parties concerned were entitled to a judicial investigation of their status. The Court of Appeals was reversed. The Court held, "a mere allegation of citizenship is not enough. But before the Courts can be called upon, the preliminary sifting process provided by the statutes must be gone through with." At page 168:

"* * * it is one of the necessities of the administration of justice that even fundamental questions should be determined in an orderly way."

At page 167:

“Before us it was argued that, by the construction of the Statute, the fact of citizenship went to the jurisdiction of the Immigration Officers (see *Gonzales v. Williams*, 192 U.S. 1.) * * * We are of the opinion, however, that the words quoted¹ apply to a decision on the question of citizenship, and that, even if it be true that the statute could not make that decision final, the consequence drawn by the Court of Appeals does not follow, and is not correct.”

The Court did not decide the question of whether the Act could make the decision of an *executive officer* final upon the fact of citizenship.

Again on page 167:

“In order to act at all, the executive officer must decide upon the question of citizenship * * * The first mode of attacking his decision is by taking that appeal. If the appeal fails, it then is time enough to consider whether, upon a petition showing reasonable cause, there ought to be a further trial upon habeas corpus.”

And at page 168:

“Here the issue, *if there is one*, is pure matter of fact,—a claim of citizenship under circumstances and in a form *naturally raising a suspicion of fraud*.” (Emphasis ours.)

¹“In every case where an alien is excluded from admission into the United States . . . the decision of the appropriate immigration or customs officers, if adverse to admission of such alien, shall be final unless reversed on appeal to the Secretary of the Treasury.”

In *Ju Toy* the Chinese claiming native birth was detained on board ship. He was denied permission to land by the Collector of the Port of San Francisco. This decision was affirmed by the Secretary of Commerce. The writ issued. A return and motion to dismiss the writ on the ground that the decision of the Secretary was conclusive and no abuse of authority was shown, was filed. These were denied and the District Court on seemingly new evidence decided *Ju Toy* was a native born citizen. After appeal to the Circuit Court of Appeals the latter Court certified three questions.

(1) "Should a District Court * * * grant a writ of habeas corpus * * * when * * * the petition for writ alleges unlawful detention on the sole ground that petitioner does not come within the restrictions of the Chinese exclusion acts, because born in and a citizen of the United States and does not allege or show in any other way unlawful action or abuse of their discretion or powers by the immigration officers who excluded him?"

(2) "In a habeas corpus proceeding should a district court of the United States dismiss the writ or should it direct a new or further hearing upon evidence to be presented * * *?"

(3) "* * * —should the court treat the finding and action of such executive officers upon the question of citizenship * * * as final * * * unless it be made affirmatively to appear that such officers, in the case submitted to them, abused the discretion vested in them or in some other way in hearing and determining the same committed prejudicial error?"

The Court held:

“We are of opinion that the first question should be answered, no; that the third question should be answered, yes, with the result that the second question should be answered that the writ should be dismissed, as it should have been dismissed in this case.”

At page 263, we quote:

“The petitioner, altho physically within our boundaries, is to be regarded as if he had been stopped at the limit of our jurisdiction and kept there while his right to enter was under debate. If, for the purpose of argument, we assume that the Fifth Amendment applies to him and that to deny entrance to a citizen is to deprive him of liberty, we nevertheless are of the opinion that with regard to him due process of law does not require a judicial trial. That is the result of the cases which we have cited and the almost necessary result of the power of Congress to pass exclusion laws. That the decision may be entrusted to an executive officer and that his decision is due process of law was affirmed and explained in *Nishimura Ekiu v. U.S.* 142 U.S. 651, 660, and in *Fong Yue Ting v. U.S.* 149 U.S. 698, 713, before the authorities to which we already have referred.”

Chin Yow v. U. S. (1908), 208 U.S. 8;

Tang Tun v. Edsell (1912), 223 U.S. 673;

Kwock Jan Fat v. White (1919), 253 U.S. 454.

In *Kwock Jan Fat*, the Chinese petitioner as a *resident* of the United States, intending to leave the United States on a temporary visit to China, filed an

application for a pre-investigation of his claimed status as an American citizen by birth. An elaborate investigation was made and the application was approved. Anonymous information received by the San Francisco Office of Immigration and Naturalization during his absence resulted in a denial of permission to land upon his return. His petition for a writ of habeas corpus was denied. The Supreme Court held that review of the proceedings was possible only when a full record is preserved, and for failure to so preserve the record reversed, and remanded to the District Court for a trial on the merits of the claim of citizenship.

Kwock Jan Fat must be kept clearly in mind as a Chinese who had long been a resident of the United States and who, after an elaborate investigation prior to departure from the United States had been determined to be a citizen.

In *Ng Fung Ho v. White*, 259 U.S. 276, a Chinese claim of derivative citizenship by a *resident* reached the Supreme Court following an expulsion order of deportation under the Immigration Act of 1917. The claimants had originally been admitted as citizens.

Justice Brandeis, speaking for the Court, p. 282, said:

“If at the time of the arrest they had been in legal contemplation without the borders of the United States, seeking entry, the mere fact that they claimed to be citizens would not have entitled them under the Constitution to a judicial hearing. *U. S. v. Ju Toy*, 198 U.S. 253; *Tang Tun v. Edsell*, 223 U.S. 673.” * * *

“The constitutional question presented as to them is: may a resident of the United States who claims to be a citizen be arrested and deported on executive order? The proceeding is obviously not void *ab initio*. *U. S. v. Sing Tuck*, 194 U.S. 161. But these petitioners did not merely assert a claim of citizenship. They supported the claim by evidence sufficient, if believed, to entitle them to a finding of citizenship. The precise question is: Does the claim of citizenship by a resident, so supported both before the immigration officer and upon petition for a writ of Habeas Corpus, entitle him to a judicial trial of this claim?”

The Court then distinguished the deportation under the Chinese exclusion law of a resident who claims citizenship, p. 283:

“There the proceeding for deportation is judicial in nature. It is commenced usually before a commissioner of the court; but on appeal to the District Court *additional evidence* may be introduced and the trial is *de novo*. * * * Here the proceeding is throughout executive in its nature.

“Jurisdiction in the executive to order deportation exists only if the person arrested is an alien. The claim of citizenship is thus a denial of an essential jurisdictional fact.”

“* * * where there is jurisdiction a finding of fact by the executive department is conclusive, *U. S. v. Ju Toy*, 198 U.S. 253; and courts have no power to interfere unless there was either denial of a fair hearing, *Chin Yow v. U. S.*, 208 U.S. 8, or the finding was not supported by evidence, *American School of Magnetic Healing v. McNulty*,

187 U.S. 94, or there was an application of an erroneous rule of law. *Gegiow v. Uhl*, 239 U.S. 3."

Tisi v. Tod, 264 U.S. 131, (1924) was an alien deportation (expulsion) case.

Finally, in *Quon Quon Poy v. Johnson*, 273 U.S. 352 (1927) the Supreme Court had before it the Chinese claim of derivative citizenship by one who had never resided in the United States. Admission into the United States was denied. The petitioner was *excluded*. On the petition the District Court declined to hear witnesses offered and the writ was discharged. At page 358, the Court said:

"It is clear, however, in the light of the previous decisions of this court, that when the petitioner, who never resided in the United States, presented himself at the border for admission, the mere fact that he claimed to be a citizen did not entitle him under the Constitution to a judicial hearing; and that unless it appeared that the departmental officers to whom Congress had entrusted the decision of his claim, had denied him an opportunity to establish his citizenship, at a fair hearing, or acted in some unlawful or improper way, or abused their discretion, their finding upon the question of citizenship was conclusive and not subject to review, and it was the duty of the court to dismiss the writ of habeas corpus without proceeding further. *U. S. v. Sing Tuck*, 194 U.S. 161, 168; *U. S. v. Ju Toy*, 198 U.S. 253, 263; *Chin Yow v. U. S.*, 208 U.S. 8, 11; *Tang Tun v. Edsell*, 223 U.S. 673, 675; and *Ng Fung Ho v. White*, 259 U.S. 276, 282."

On pages 14 and 15 of their brief appellants cite and quote from *Go Lun v. Nagle*, 22 F. 2d 246, 248 (C.A.-9 1927). Go Lun was a Chinese, born in China, who sought admission to the United States as a derivative citizenship claimant. He was excluded. The Court of Appeals relied upon *Tisi v. Tod*, 264 U.S. 131, a resident *alien* expulsion case. *Quon Quon Poy v. Johnson*, supra, decided in February, 1927, was either ignored or overlooked. The effect of the decision in the *Go Lun* case is to substitute the Court's opinion or conclusion, for the conclusion of the administrative officer. The denial of a fair hearing is not established by deciding merely that the decision was wrong. How can any Court decide whether to believe a Chinese witness by reading a printed record! It is an absurdity. The burden of proof is on the Chinese to produce competent evidence in a proper proceeding, if such is possible, not upon the government of the United States, its officers or agents. In the interest of the rights of the native born citizens of the United States the Courts of the United States should establish that such proof be of a nature that is clear and convincing. Verbal gymnastics directed to the evaluation of various "discrepancies" disclosed in a cold printed transcript can be no sound basis for the substitution of one opinion for another. It would seem to assume the existence of an insight transcending the usual limits of human thought. The mere drip of cases which have reached the Court of Appeals as against the thousands of claimants who have been permitted to enter via administrative pro-

ceedings should of itself have roused the Court to set a standard that would require the production of adequate proof. If a country is so backward, or primitive, that records are not required or kept, the onus is not to be placed upon those who are of the true body politic but upon the person who would make the claim to be of that body. The fathers from whom the claim would spring are charged with the responsibility to properly establish such claim from its inception.

The cases of *Gung You v. Nagle*, 34 F. 2d 848, 852; *Quan Toon Jung v. Bonham*, 119 F. 2d 915; *Wong Tsick Wye, et al v. Nagle*, 33 F. 2d 226; *Chun Kwock Quan v. Proctor*, 92 F. 2d 326; *Wong Kam Chong v. U. S.*, 111 F. 2d 707, 712; *Lee Hin v. U. S.*, 74 F. 2d 172; and *Chin Hong Yuk v. U. S.*, 23 F. 2d 174, 175, all of this circuit, are cited on pages 16, 17 and 18 of appellants' brief with regard to expressions of this Court concerning weight to be given testimony of witnesses, discrepancies, and quantum of proof.

Gung You v. Nagle was another claim to derivative citizenship. Judge Wilbur cited none of the pertinent Supreme Court cases but at great length reviewed the immigration record and then substituted his opinion for that of immigration.

In *Quan Toon Jung v. Bonham*, the question involved was again derivative citizenship claim after exclusion by immigration. This Court, at p. 920, stated:

“Given a fair inquiry in these cases, the courts are bound to accept the determination of the ad-

ministrative authorities on questions of fact and of the credibility of witnesses.”

The Court then went on to examine the proof and to render a decision contrary to its own acknowledgment of the law.

The same may be said of *Wong Tsick Wye v. Nagle*, wherein Judge Rudkin stated, at p. 227:

“This court and other courts having to do with immigration cases are constantly called upon to consider the effect of discrepancies of one kind or another in testimony taken before the immigration department.”

Chun Kwock Quan v. Proctor is cited completely out of context in that it involved a claim of *native* citizenship by one who had *previously been recognized as a citizen of the United States*.

Although Chun, the appellant in that case, *had previously been in* the United States and was *excluded* by Immigration upon his return, Judge Denman recognized that the principles controlling a review in these circumstances had long been established by the Supreme Court and the Ninth Circuit, and stated: “The burden of proving citizenship is on the appellant,” but went on to say, at page 330:

“It is not by unfounded suspicious inferences against consistent statements of the record that an *established citizenship* may be destroyed.” (Emphasis ours.)

Deportation under the Chinese Exclusion Act was the problem involved in *Wong Kam Chong v. U. S.*

The decision in that case was specifically restricted to cases where deportation was sought of one claiming to be a *native-born citizen* of the United States and who had *previously been determined* to be such *native-born* citizen by immigration officials. This case is not pertinent to the problem; however, Judge Haney did mention the problem of burden of proof at page 710:

“Burden of proof in one sense means the duty to establish a certain fact by a certain degree of proof, such as a preponderance of the evidence, clear and convincing evidence, or beyond a reasonable doubt. In another sense it means the duty to offer evidence or the duty to go forward with the evidence.”

Lee Hin v. U. S. and *Ching Hong Yuk v. U. S.* also are not in *point* in that both involved *deportation* of persons claiming to be native-born citizens of the United States.

In addition to the aforesaid cases, appellants also cite the cases of *Yuen Boo Ming v. U. S.*, 103 F. 2d 355, 358 (CA-9); *Wong Wing Foo v. McGrath*, 196 F. 2d 120, 122 (CA-9); *Acheson v. Yee King Gee*, 184 F. 2d 382 (CA-9); *Wong Gook Chun v. Proctor*, 84 F. 2d 763, 765 (CA-9), and *Tillinghast v. Wong Wing*, 33 F. 2d 290 (CA-9).

Yuen Boo Ming v. U. S. was another case involving an order of *deportation* in the case of a Chinese who prior to the order of deportation had been found and “*certified a citizen*” by Immigration. Apparently the Court found that the complaint under which appellant was arrested was not based on fact but

only on information and belief and considered the information as a "concealed charge" (p. 358). It is in this case that Judge Denman observed "* * * one of the reasons why there is current in America the phrase 'a Chinaman's chance,' " quoted by appellants herein.

As stated earlier in our brief, here we are confronted with claims to citizenship by persons about whom the government of the United States, as well as the Courts, know nothing, and if the argument as stated by appellant in his brief were accepted, then it is submitted, the phrase "not a Chinaman's chance" would be more apt to describe the position of the United States.

At page 25 of their brief, appellants cite the cases of *Acheson v. Yee King Gee* and *Wong Wing Foo v. McGrath* to support their contention that:

"Nor is the application of Sec. 903, *supra*, limited to case involving alleged expatriation; it is available to any person claiming citizenship who has been refused permission to come to the United States by a consular officer."

We have previously discussed the case of *Yee King Gee*. This Court did not consider the jurisdiction aspects of Section 903 but only the question of venue. Neither did this Court, in *Wong Wing Foo*, give full consideration to the jurisdictional aspects of the case. *Wong Wing Foo* appeared before Immigration in possession of a United States passport and with that in mind, this Court stated:

“* * * he was denied his claimed right to enter at once * * *”

and therefore could institute an action under 8 U.S.C. 903 without further exhausting his administrative remedies. This Court found that the District Court erred in admitting the immigration files in evidence, and the case was remanded to the District Court for further hearing.

Reference is made to the authorities and argument heretofore made with regard to jurisdiction and particularly to the significance of the passport as related to the application to the Consul at Hong Kong for documentation to come to the United States, the Presidential Proclamation of 1941, and the 903 action. *Wong Wing Foo* should be overruled.

We quote the following from page 30 of appellants' brief:

“If this positive, uncontradicted and unimpeachable evidence be insufficient to establish citizenship under Sec. 1993 of the Revised Statutes it is difficult to see how any Chinese child of a United States citizen could establish his citizenship.”

At this point, it is not amiss to say that such contention is *not a new one*, and the remarks of Judge Bourquin in *Ex parte Jew You On* (D.C. N.D. Cal. S.D.), 16 F. 2d 153, made November 24, 1926, are pertinent:

“It is argued that, if the bare oath of two or three Chinese or other persons is not accepted, Chinese American citizens procreated in China

will be barred from this country of their fathers' nativity. *The answer is the responsibility is not the immigration officers' nor the courts'.* Like any case, the burden is the proponent's to prove it. *Perhaps not unfamiliar registry systems might be adopted.* Otherwise, this country is helpless, the exclusion policy futile, and the Chinese admitted will be limited solely by the extent there is courage to take advantage of opportunity."

and just as applicable today as they were then.

3. THE EVIDENCE.

Appellants summarized the evidence adduced at the trial which they believe entitled them to a judgment of United States nationality on pages 18 and 19 of their brief. We quote:

"Here the evidence submitted by appellants to establish their citizenship is positive, uncontradicted and unimpeached. The four children, the aunt and the grandmother gave testimony upon the issue."

* * * * *

"The testimony of the uncle regarding his remittances for the support of his brother's wife and children in China is to that extent corroborating of the direct testimony given by the other six witnesses."

Exactly what evidence was adduced at the trial?

- (1) Neither of the alleged parents was present. There was no one who could directly testify of his own knowledge as to such parentage.

- (2) The appellants and their alleged older brother testified they were related to each other and were the children of Fong Lim Fong and Ju Shee.

They are extremely interested parties, and their testimony, if admissible at all, has little weight.

“No individual can by his own testimony give *convincing* evidence as to the place of his birth.

* * * His testimony must necessarily be classed as secondary evidence, its truthfulness or falsity being entirely dependent upon the accuracy of information communicated to him by others; and being hearsay, it is entitled to little credence, unless corroborated.”

Ex parte Lung Wing Wun, 161 F. 211, 213.

This Court, in *Sue v. Nagle*, 295 F. 676 (CA-9, 1924), stated:

“In cases of this character (Sec. 1993 derivative citizenship) experience has demonstrated that the testimony of the parties in interest as to the mere fact of relationship cannot be safely accepted or relied upon.” (Words in parentheses ours.)

See, also:

Lau Hu Yuen, 85 F. 2d 327 (CA-9, 1936).

- (3) The best witness appellants presented was their alleged paternal grandmother, Yee Song Mee, aka Fong Yee Shee. To what did she testify?

She testified she was the mother of Fong Lim Fong, the plaintiff's father (Tr. 25), and that she returned to her son's home in China in 1935, where she re-

mained for a period of about eleven months (Tr. 28, 34); that when she arrived in China plaintiffs, Fong Hung Wing and Fong Wone Jing, were living with her son in the village (Tr. 30); that while she was there in this village, a *son* by the name of Fong Ngar Jing was born on January 30, 1936, to her son, Fong Lim Fong, and her daughter-in-law, Jee Shee (Tr. p. 30); that from 1936 to the time of their arrival in the United States she had not seen the two older plaintiffs and had never seen the younger plaintiff (Tr. 37).

Analyzing the grandmother's testimony: (a) although she stated that her first grandson was at the village in 1935, at no time did she testify seeing the first grandson, Fong Din Dick, aka Fong Hung Fong, in China; (b) she testified that the plaintiff, *Fong Hung Wing*, was living with her son when she came to China in 1935, whereas the testimony of all the other witnesses and the allegations in the complaint show that he was *not born* at that time; (c) she testified that a *son* by the name of Fong Ngar Jing was born to her son while she was in China. Plaintiff *Fong Ngar Jing is a girl*; (d) in any event, the witness had not seen any of the plaintiffs since 1936, at which time the oldest would have been two years of age.

The only other witness who claimed to have seen the two older plaintiffs prior to their arrival in the United States was the alleged aunt, Ruby Fong. She accompanied her mother to China in 1935 and stated that the two older appellants were living in her

brother's house at that time. She first testified that the plaintiff, Fong Hung Wing, was not born while she was in China, but then changed her testimony and stated he was born while she was there. (Tr. 76.) Although she had not seen the two older plaintiffs since they were two years and a few months old, respectively, and had never seen the third appellant until her arrival in the United States in 1952, the witness positively identified them as the children of her brother.

In *Hung You Hong v. U. S.*, 48 F. 2d 67 (CA-9, 1933), this Court considered the case of one who claimed birth in Hawaii but against whom deportation (expulsion) proceedings had been brought. The subject produced a witness, Lum Hop, who testified he knew the subject when he was one or two years old, did not see him again until he was 8 or 10 years old, and did not see him again until he was 18 or 20 years old. With regard to the testimony of the witness, Judge Wilbur stated, at pages 67 and 68:

“* * * it is obvious he *would not be able to identify the appellant from his own observation.* * * * It is at best very weak evidence to establish the fact that the appellant was the child born 30 years before in Hawaii.”

As has already been shown, the testimony of the grandmother is at complete variance with the allegations made in behalf of appellants, and in any event, neither the grandmother or aunt gave any testimony that could be considered by the Court.

The testimony of the alleged uncle and guardian ad litem, William Y Fong, is of no weight in that he at *no* time saw the plaintiffs prior to their arrival in the United States in 1952. He testified (Tr. 45, 46, 47) that he supported plaintiffs and their mother over a period of years, and counsel also stated that William Fong had supported plaintiffs over the years (Tr. 85). However, evidence of such support in the form of money orders cover a period of approximately one year and do not show payment to plaintiffs or their alleged mother, Jee Shee. All were made to Fong Din Dick. There is nothing in the evidence to support the argument of counsel (Tr. p. 85) that the guardian ad litem for years had supported the appellants herein.

CONCLUSION.

The "Order for Judgment" below (Tr. 11) states: "The evidence presented by plaintiffs does not conform to the standards fixed by *Ly Shew v. Acheson*, No. 30159 and No. 31161, this day decided." Judge Goodman's opinion, 110 Fed. Supp. 50, has been extensively commented upon by appellants. (See also Judge Westover's opinion in *Mar Gong v. McGranery*, 109 F. Supp. 82.) In the argument and briefs of that case appellee herein attempted to thoroughly consider the various aspects of the 903 cases. Although much time and effort were expended, many facets of the problem were not explored. The pressure of over 700 cases in their various procedural

stages in the lower Court, and the large number of appeals, presently docketed in this Court, have motivated an attempt to present to this Court the full perspective of nonresident Chinese claims of derivative citizenship as now posed in the 903 declaratory judgment actions.

The question of jurisdiction has been squarely and, we hope, fully presented to the Court. We also hope the Court will squarely meet the issue and decide it.

If the Court passes the jurisdictional problem we hope we have squarely presented the question of the burden of proof and that the issue will likewise be met.

On the evidence we feel the appellants have a weak case and that the Court may well dispose of the case by simply finding there was no error below. This conclusion we expect in any event. But because if not met here the other problems must be met in other cases soon to follow, a decision on all aspects of the case is requested.

Dated, San Francisco, California,
October 23, 1953.

Respectfully submitted,

LLOYD H. BURKE,

United States Attorney,

CHARLES ELMER COLLETT,

Assistant United States Attorney,

Attorneys for Appellee.

MORTON M. LEVINE,

Immigration and Naturalization Service,

On the Brief.

No. 13,745

IN THE
United States Court of Appeals
For the Ninth Circuit

FONG WONE JING, FONG HUNG WING
and FONG NGAR JING, by their
Guardian Ad Litem, William Y.
Fong,

Appellants,

vs.

JOHN FOSTER DULLES, as Secretary of
State,

Appellee.

APPELLANTS' REPLY BRIEF.

JACKSON & HERTOGS,

JOSEPH S. HERTOGS,

580 Washington Street, San Francisco 11, California,

ARTHUR J. PHELAN,

1306 Mills Tower, San Francisco 4, California,

Attorneys for Appellants.

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Fong,

Appellants,

vs.

JOHN FOSTER DULLES, as Secretary of
State,

Appellee.

APPELLANTS' REPLY BRIEF.

The greater part of appellee's brief is devoted to contending that the trial Court did not have jurisdiction of the case, a contention, incidentally, which appellee did not make in the Court below.

In his argument relative to jurisdiction appellee discusses many matters which do not actually involve the jurisdiction of the Court, and which in the interest of clarity should be disposed of before proceeding to a consideration of his main contentions. We shall therefore deviate somewhat from the order fol-

lowed in appellee's brief, but we think this deviation is necessary to eliminate confusion both as to the facts and as to the legal propositions involved.

1. THE DISTRICT COURT HAD JURISDICTION OF THE CASE.

(a) Appellants have been denied a right and privilege as nationals of the United States.

In his statement of the case appellee asserts that appellants did not prove the allegations of the complaint that the Consulate General at Hong Kong had denied them passports or travel documents to enable them to proceed to the United States. The allegations of the complaint in this respect are as follows:

“VI.

That on or about January 24, 1951, an application was filed with the American Consulate General at Hong Kong for the issuance of a United States passport or travel document in behalf of plaintiff, Fong Hung Wing; that on or about May 10, 1951, an application was filed with the American Consulate General at Hong Kong for the issuance of a United States passport or travel document in behalf of plaintiffs, Fong Wone Jing and Fong Ngar Jing; *that the applicants and each of them were informed by the American Consulate General at Hong Kong on or about January 24, 1952, that their applications for documentation had been denied, and that ‘the Consulate General declines to afford you facilities for the execution of an affidavit for the purpose of traveling to the United States’; and that the*

plaintiffs, Fong Wone Jing, Fong Hung Wing and Fong Ngar Jing, claim that the refusal of the American Consulate General at Hong Kong to permit the said Fong Wone Jing, Fong Hung Wing and Fong Ngar Jing to proceed to a port of entry in the United States for the purpose of having their admissibility determined by the administrative agency charged with such duty is an arbitrary and unreasonable refusal or denial of a right or privilege of a United States national;" (T 5-6).

The denial of such documents to appellants by the Consulate General was at no time disputed in the Court below, but was tacitly admitted in the opening statement (T. 20-21) and throughout the trial. Moreover, the averment in paragraph VI of the answer that "defendant has no knowledge, information or belief as to the allegations contained in paragraph VI of the complaint and therefore denies the same," is entirely insufficient, under numerous authorities, to put in issue the facts positively alleged in the complaint regarding the denial of their applications by the Consul General.

It is well settled that a denial on the ground of lack of knowledge, information and belief, of a fact which is a matter of public record, or is within the knowledge of the defendant or accessible to him by consulting his records, is insufficient and frivolous.

Oregon Mesabi Corp. v. C. D. Johnson Lumber Corp. (C.A. 9) 166 F.(2d) 997, 1001; cert. den. 334 U. S. 837, 68 S. Ct. 1494, 92 L. Ed. 1762;

Lloyd Sabaudo Societa Anonime Per Azioni v. Elting (D. C., S.D., N. Y.) 46 F.(2d) 315;
Nieman v. Bethlehem Nat. Bank (D. C., E. D., Pa.) 32 F. S. 436;
Christmas v. City of Asbury Park (D. C., N. J.) 10 F. S. 22, 25;
Reed v. Turner (D. C., E. D., Pa.) 2 F. R. D. 12.

See also:

71 C. J. S. 259;
Peacock v. United States (C.A. 9) 125 F. 583, 586-587.

Obviously the appellee, Secretary of State, may not disclaim knowledge or information as to whether his own subordinate, the Consul General at Hong Kong, had denied appellants' application for travel documents as specifically alleged in the complaint. That information was readily obtainable from the Consulate General. While appellee's counsel stated at the trial that "the entire State Department file has been lost" it appears from his statement that it was lost in Washington about three months before the trial began (T. 20), or about five months *after* the answer was filed. Therefore, there *was* a State Department record covering the case, and it was not simply a matter, as appellee suggests, of three unknown Chinese children appearing at the Consulate General and being told "I don't know who you are" (Appellee's Brief p. 37).

In the *Lloyd Sabaudo* case, *supra*, the defendant Collector of Customs denied knowledge or information

sufficient to form a belief as to certain official action alleged to have been taken in the case by the immigration authorities. The Court said:

“The defendant, having acted as an officer of the Government in the collection of the fines, was entitled to have access to the records which disclosed the facts upon which the fines were based, and as a matter of law must be presumed to have had knowledge of these facts (citing cases).”

The Court went on to quote from *Dahlstrom v. Gemunder*, 198 N. Y. 449, 92 N. E. 106, 19 Ann. Cas. 771, as follows:

“A party may not thus deny the possession of knowledge or information which presumably he has; *neither may he purposely turn his head and close his eyes and ears for the purpose of avoiding knowledge and information, and of enabling him to make a denial thereof.*” (Italics added.)

Obviously, therefore, the specific allegations in the complaint that these appellants filed applications for passports or travel documents with the Consulate General on or about January 24, 1951 and May 10, 1951, respectively, and that the Consulate General informed them on or about January 24, 1952 that their applications had been denied, were not traversed by any proper pleading, and certainly were not in any manner disputed nor put in issue at any time in the proceedings in the trial Court.

The facts so pleaded were clearly sufficient to invoke the jurisdiction of the District Court. As this Court stated in *Westminster School District of Orange*

County et al. v. Mendez et al., 161 F.(2d) 774, 778, which involved alleged denial of rights or privileges guaranteed by the Constitution and Federal Laws:

“It is said in *Bell v. Hood*, 327 U. S. 678, 682, 66 S. Ct. 773, 776 that ‘* * * the court must assume jurisdiction to decide whether the allegations state a cause of action on which the court can grant relief as well as to determine issues of fact arising in the controversy’. Therefore, the District Court was right in taking jurisdiction”.

In

The Fair v. Kohler Die and Specialty Co., 228

U. S. 22, 25, 33 S. Ct. 410, 411, 57 L. Ed. 716,

Mr. Justice Holmes said:

“Conversely, when the plaintiff bases his cause of action upon an Act of Congress, jurisdiction cannot be defeated by a plea denying the merits of the claim * * * But if the plaintiff really makes a substantial claim under an Act of Congress, there is jurisdiction whether the claim ultimately be held good or bad”.

In that case Justice Holmes went on to say that the appellant’s plea “though purporting to go to the jurisdiction of the court” merely amounted to a contention that the basis for a recovery did not exist, and held that the trial Court properly took jurisdiction of the case.

As stated by the Supreme Court in

Binderup v. Pathe Exchange, 263 U. S. 291, 44

S. Ct. 96, 68 L. Ed. 308:

“A complaint setting forth a substantial claim under a Federal statute presents a case within the

jurisdiction of the court as a Federal Court, and this jurisdiction cannot be made to stand or fall upon the way the court may chance to decide an issue as to the legal sufficiency of the facts alleged any more than upon the way it may decide as to the legal sufficiency of the facts proven. Its decision either way upon either question is predicated upon the existence of jurisdiction, not upon the absence of it. Jurisdiction as distinguished from merits, is wanting only where the claim set forth in the complaint is so unsubstantial as to be frivolous, or, in other words, is plainly without color of merit (citing cases)."

In the case at bar, the claim set forth in the complaint was obviously a substantial one, and this was clearly sufficient to invoke the jurisdiction of the Court below. The situation is entirely different from that which was presented in the case of *Clark v. Inouye*, 175 F.(2d) 740, wherein the complaint alleged no facts, but only a conclusion of law, with respect to any asserted denial of any right or privilege. In the case at bar the denial of the specific right and privilege was factually pleaded, and the facts so pleaded were not even traversed except by a *pro forma* denial for asserted lack of knowledge or information which was obviously insufficient to put the matter in issue, as we have heretofore demonstrated. Nor did appellee at any time in the course of the trial in any matter dispute or deny the consular rejection of appellants' claim.

Appellee's present contention puts him somewhat in the same position as was the appellant-defendant in

Louisville & N. R. Co. v. Botts (C.A. 8) 173
F.(2d) 164, 168-169.

In that case it was held that where the defendant had not asserted that it was not engaged in interstate commerce, either in its opening statement, its evidence or its closing argument, an attempt to raise that point by way of an exception to the instructions came too late. In that case interstate commerce was the basis of the right of recovery under the statute, and yet it was held that the defendant could not raise the point after ignoring it throughout the trial. Certainly appellee is in no better position in this case to contend for the first time on appeal that there was no denial of any right or privilege of appellants by the Consulate General. Moreover, there was no denial of the allegations of the complaint in that regard sufficient to put the matter in issue, since appellee, under the authorities we have cited above and many others to the same effect, could not plead lack of information as to official action taken by his own subordinate, i.e., could not "purposely turn his head and close his eyes and ears for the purpose of avoiding knowledge and information and of enabling him to make a denial thereof" (*Dahlstrom v. Gemunder*, supra).

We might add that had there been no denial of travel documents by the Consul General he certainly would not have issued the certificate of identity which is prescribed by section 903 for issuance to persons who have filed a suit thereunder and who make a showing under oath to the consular officer that the claim presented in such action is made in good faith

and has a substantial basis. Issuance of such a certificate is a recognition that there was substantial basis for the suit which had been instituted, and obviously the Consul General would not have issued the certificate unless his records showed that the alleged denial by him, which was the basis of the suit, had actually occurred.

Appellee also contends that denial of a passport does not constitute denial of a right or privilege because issuance of a passport is discretionary. This contention is obviously baseless in view of the requirement of Presidential Proclamation No. 2523 (55 Stat. 1696) that any citizen attempting to enter the United States must have a passport unless within exceptions prescribed by the Secretary of State. Without a travel document issued by the Consulate General no carrier in the Orient will transport any citizen or alleged citizen to the United States, for fear of penal proceedings under 22 U. S. C. sec. 225. Consequently, a refusal to issue a passport, or to except the applicant from the requirement, now effectively prevents the applicant from proceeding to the United States, and we fail to see how it can be contended that such a deprivation is not the denial of a right or privilege of a national of the United States within the meaning of section 903 under which this action was brought. That section has repeatedly been applied to cases involving denial of a passport (Cf. *Acheson v. Yee King Gee* (C.A. 9) 184 F.(2d) 382; *Schioles v. Secretary of State* (C.A. 7) 175 F.(2d) 402).

This Court previously expressed its opinion in the case of *Wong Wing Foo v. McGrath*, 196 F.(2d) 120, at page 122:

“Nothing in the above text suggests that the ‘action * * * for a judgment declaring him to be a national’ is to succeed some prior administrative proceeding. This action is largely invoked where there has been no administrative proceeding at all. Such is the case where the Department of State refused to give a passport. *Perkins v. Elg*, 307 U.S. 325; *Podea v. Acheson*, 179 F.(2d) 306 (Cir. 2); or where a consul refuses to register a person as a United States national, *Acheson v. Mariko Kuniyuki*, 189 F.(2d) 741 (Cir. 9); or refuses to allow a person claiming American citizenship to come to this country, *Acheson v. Yee King Gee*, 184 F.(2d) 382 (Cir. 9); or where American citizens acting under claimed duress have filed with the Attorney General notices of their renunciation of citizenship and then later seek to have them set aside. *McGrath v. Tadayasu Abo*, 186 F.(2d) 766 (Cir. 9).”

At this point we shall dispose of a related contention made in appellee’s brief which appears to us to border upon the frivolous, viz.: that “the granting of the certificate of identity removed the denial and permitted the appellant to come to the United States, and his claim should have been processed through the Immigration Service” (Appellee’s Brief p. 38).

The utter absurdity of this proposition is demonstrated by reading the statute and the regulation.

The sole purpose and effect of such a certificate are that the plaintiff “may be admitted to the United States with such certificate *upon the condition that he shall be subject to deportation in case it shall be decided by the Court that he is not a national of the United States*” (italics added) (8 U. S. C. sec. 903, *supra*). Need we say more? Does appellee mean to contend that where a Consul denies a citizen a right, and the citizen sues, and the Consul issues a certificate of identity which permits the plaintiff to enter the United States *for the sole purpose* of obtaining a decision in the suit, that the suit collapses with the issuance of such a certificate? Such a proposition is palpably absurd.

Equally baseless is the suggestion that appellants’ claim “should have been processed through the Immigration Service”. That is just what the Consular authorities by their actions have prevented. Appellants originally applied to the Consulate for travel documents to permit them to proceed to a port of entry for that very purpose. That application was denied. They were forced to file suit, since they could not legally proceed to the United States without a passport unless waived by the State Department (22 U. S. C. secs. 223-226; Proclamation No. 2523, 55 Stat. 1696). The Consul then issued them the certificate of identity prescribed by sec. 903, *supra*, which permitted them to come to the United States *solely* to await the Court’s decision in the suit. The immigration regulations (8 C. F. R. sec. 112.2, 1947 Ed.) spe-

cifically precluded the immigration authorities from determining the citizenship claims of holders of such certificates of identity, in the following language:

“The holder of such a certificate of identity *shall be regarded as an alien until otherwise finally held by the court* in the action for a judgment declaring him to be a national of the United States. *He shall be admitted to the United States as a temporary visitor for business on the condition, including when deemed necessary, the giving of a bond with sufficient surety, that he shall depart from the United States* if it is discovered that he has obtained admission by fraud or other illegality or *if the final action in court to determine his nationality is not to the effect that he is a national of the United States. * * **” (Italics added).

Obviously, therefore, the issuance of the certificate of identity did not remove the denial of appellants' rights and privileges, since it merely permitted them to come to the United States as aliens *solely* for the purpose of litigating the suit, and did not permit them to submit their citizenship claim to the immigration tribunals for determination, but by express provision of the statute required their deportation if the suit was decided adversely to them. As a matter of fact, the sole purpose of their application to the Consulate for travel documents in the first place was so that they might proceed to a port of entry and submit their claim to the immigration tribunals, and that is just what the Consul prevented them from doing.

Appellee's brief further suggests that appellants were among an indeterminate number of applicants who "literally deluged" the Consulate, that the Consul said: "I don't know who you are" and declined to grant the documentation, and that a complaint was filed "forthwith" in the District Court. Apparently the implication here also is that there had been no denial of any right or privilege by the Consulate.

As pointed out above, the complaint specifically alleged that these appellants applied at the Consulate *on or about January 24, 1951 and May 10, 1951* respectively, and that they "were informed by the American Consulate General at Hong Kong *on or about January 24, 1952 that their applications for documentation had been denied*, and that 'the Consulate General declines to afford you facilities for the execution of an affidavit for the purpose of travelling to the United States' " (T. 5-6). There was no effective denial of these positive averments. Parenthetically it might be observed that an applicant would be just as effectively stopped by an obdurate "I don't know who you are" as by any other verbal formula. If he could be deprived of his statutory recourse under section 903, *supra*, by consular refusal to act upon his case (as the foregoing suggestion would seem to imply), then indeed even the proverbial "Chinaman's chance" mentioned by this Court in *Yuen Boo Ming v. United States*, 103 F.(2d) 355, 358, would have been taken away. Here, however, the specific denial by the Consulate is alleged, and is uncontradicted.

For the foregoing reasons it is clear that appellants were denied "a right or privilege as a national of the United States" within the meaning of section 903, *supra*, viz., the right to proceed to the United States. We turn now to the question whether that section applies only to expatriation cases and to individuals who have previously resided in the United States.

- (b) The statutory remedy (8 U.S.C. sec. 903) is not limited to persons who have previously been in the United States or to expatriation cases.

The words of the statute are broad and clear. There is no ambiguity. The statute says that "*any person*" who is denied a right *or privilege* as a national "by *any* Department or Agency, or executive official thereof" upon the ground that he is not a national, may bring the action for a declaration that he is a national. This expression is in the broadest possible terms (see *Johnson v. Southern Pac. Co.*, 25 S. Ct. 158, 196 U.S. 1, 49 L.Ed. 363, 369; 48 *C.J.* 1041).

There is no indication in this sweeping language that the remedy is available only where a question of expatriation is involved. Neither is there indication that foreign-born citizens were excepted if they had not theretofore been in the United States. The statute states that "*any person*" who claims a right or privilege as a national, and who is denied such right or privilege, "regardless of whether he is within the United States or abroad" may institute the action.

Obviously this Court cannot read into this all-embracing language limitations which are not there. This Court has heretofore construed this language to mean that the priceless right of citizenship was not to be denied one possessing it by an administrative proceeding (*Wong Wing Foo v. McGrath*, 196 F.(2d) 120, 122).

Appellee quotes from the Congressional debates upon the bill which became the Nationality Act of 1940. But debates in Congress are not appropriate sources of information from which to discover the meaning of the language of a statute passed by that body.

U. S. v. Trans-Missouri Freight Assoc., 166 U. S. 290, 318, 17 S. Ct. 540, 41 L. Ed. 1007, 1020.

Reports of committees may be considered "where otherwise the meaning of a statute is obscure".

Duplex Printing Press Co. v. Deering, 254 U. S. 443, 474, 41 S. Ct. 172, 65 L. Ed. 349, 360.

"But while they may be looked at to explain doubtful expressions, not even formal reports—much less the language of a member of a committee—can be resorted to for the purpose of construing a statute contrary to its plain terms * * *."

Penn. R. Co. v. International Coal Mining Co., 230 U. S. 184, 33 S. Ct. 893, 57 L. Ed. 1446.

"The debate between two congressmen on the floor of the house * * * concerning the meaning

of Section 903 thereof, is not the measure of the content of the Section * * *

Gow Seng Tong v. Carusi (D. C., S. D., Cal.)
83 F. S. 480, 481.

Finally, we find nothing in the material quoted by appellee which supports his position. In

Look Yua Lin v. Acheson, 87 F. S. 463, 465,
Judge Eiskine carefully considered the identical contention now under discussion, and pointed out that neither the language of the statute, the decided cases nor the Congressional debates support the contention that section 903, *supra*, applies only to cases involving expatriation or former residence in the United States.

Appellee argues that when the Nationality Act was enacted it was not mandatory for a citizen seeking to come to the United States to apply to a consular officer for a passport, and hence that Congress in enacting section 903, *supra*, could not have had in mind cases involving denial of a passport. But even if citizens were not required to have passports in order to travel at that time, certainly it was a "privilege" of a citizen to obtain one, even if only for purposes of protection. Consequently cases involving denial of a passport are clearly within the explicit language of section 903, and that section has heretofore been applied by the Courts to cases involving denials of passports (e.g., *Acheson v. Yee King Gee*, *supra*; *Schloes v. Secretary of State*, *supra*).

The immigration cases cited at pages 18-30 of appellee's brief simply establishes the principle that there

is a *constitutional* right to a judicial hearing where the Government seeks to expel a person who claims to be a citizen (*Ng Fung Ho v. White*, 259 U. S. 276, 42 S. Ct. 492, 66 L. Ed. 938) whereas there is no *constitutional* right to a judicial hearing in the case of one stopped at the border seeking entry, at least if he has never been within the United States (*Quon Quon Poy v. Johnson*, 273 U. S. 352, 47 S. Ct. 346, 71 L. Ed. 680). In the case at bar the proceeding is not one on *habeas corpus* to claim a *constitutional* right to a judicial hearing of a citizenship claim but is a suit brought under *an Act of Congress* which expressly authorizes such a suit to be instituted by *any person* who has been denied a *right or privilege* as a national on the ground that he is not a national of the United States. When Congress enacted section 903, Congress did not confine the statutory remedy thus created to cases of those who were within the United States, nor even to those who had previously resided therein. The only mention of residence in the statute has to do with venue (*Acheson v. Yee King Gee* (C.A. 9) 184 F.(2d) 382). The suitor may bring his action in the District of Columbia, or if he *claims* a permanent residence in any judicial district of the United States he may bring it in the District Court for such district. But "*any person*" may bring the action if he has been denied a right or privilege as a national.

We do not agree with appellee's suggestion that in the *Yee King Gee* case, *supra*, the question of jurisdiction was not squarely presented. That case involved a Chinese person who had never been in the United

States and who was claiming a residence in Seattle, Washington, because his father lived there. Jurisdiction of the District Court to entertain the suit was challenged, and while the Court did point out that the matter of residence was simply one of venue under this statute, the decision necessarily negatives the contention that a person without previous residence in the United States cannot sue at all under the statute. Moreover, the decision of this Court in the *Wong Wing Foo* case, *supra*, also clearly negatives the construction of the statute now contended for by appellee.

As stated by Judge Erskine in

Look Yun Lin v. Acheson, *supra*,

“However, the statute permits suit to be brought in the district where the plaintiff ‘claims’ a permanent residence. Actual residence at present or at any time in the past is not required.”

Appellee has not cited a single case which holds that section 903 is limited to cases involving expatriation or former residence, and he has cited many which hold otherwise but contends that they all should be overruled.

Both *Medeiros v. Watkins* (C.A. 2), 166 F.(2d) 897, and *Carmichael v. Delaney* (C.A. 9), 170 F.(2d) 239, relied upon by appellee, were *habeas corpus* proceedings and not suits under section 903, *supra*. The question involved in those cases was whether a person asserting citizenship could *constitutionally* be excluded (or deported) without a judicial trial of the issue

of citizenship. The Court of Appeals for the Second Circuit clearly pointed out the distinction in

U. S. ex rel. Chu Leung v. Shaughnessy, 176 F.(2d) 249,

and although holding that no constitutional bar existed to the relator's exclusion by administrative process, pointed out that he could seek a judicial declaration of his citizenship under section 903 of the Nationality Act of 1940, *supra*. The same distinction was pointed out and the same result reached by District Judge Holtzoff in

Mah Ying Og v. Clark, 81 F. S. 696.

In that case the Court said regarding section 903, *supra*:

"Its purpose was to accord a judicial remedy to a person who claims to be a citizen of the United States if this status is denied by an administrative official or administrative body. Citizenship of the United States is a very precious thing and no one's right to this status should be finally adjudicated or determined except by the Courts in a judicial proceeding. This certainly was the view of the Congress in enacting the foregoing provision of the statute."

These views were expressly approved by the Court of Appeals for the District of Columbia in deciding an appeal from a subsequent order in the same case.

Mah Ying Og v. McGrath, 187 F.(2d) 199.

In that case the Court of Appeals held that the appellant, who was born in China of an alleged American citizen parent, was entitled to have his

citizenship judicially determined under section 903, *supra*, notwithstanding the fact that he had been excluded by the immigration authorities and that a petition for writ of *habeas corpus* had previously been denied.¹

See also,

Gan Seow Tung v. Clark (D. C., S. D., Cal., 83 F. S. 482.

To conclude the discussion as to this branch of the argument, the Courts have uniformly rejected the proposition that section 903, *supra*, applies only to cases involving expatriation or previous residence in the United States. Moreover, the language of the section itself precludes such an interpretation. The effort to support the proposition by resort to the Congressional debate is likewise ineffectual.

(c) Conclusion as to jurisdiction of the trial Court.

We respectfully submit on the question of jurisdiction that:

1. The trial Court had jurisdiction over the subject matter under section 903, *supra*;
2. The allegations of the complaint respecting the consular refusal to grant travel documents to appellants were sufficient to invoke the jurisdiction of the Court under that section and those allegations were not effectually traversed nor put in issue in any manner in the Court below;

¹It is clear from the various opinions that the appellant there had not previously resided in the United States.

3. Appellants' claim of residence in the Northern District of California was sufficient to invoke the jurisdiction of the trial Court and establish venue (*Acheson v. Yee King Gee*, supra);

4. The granting of the certificate of identity which permitted appellants to come to the United States solely to prosecute the action did not remove the denial of their rights which formed the basis of the suit.

2. THE FINDINGS OF FACT ARE CLEARLY ERRONEOUS.

Appellee repeatedly states in his brief that appellants are persons about whom nothing is known. The point of this repeated assertion escapes us, but we desire to point out a few undeniable facts. *First*: Appellants claim to be the children of Fong Lim Fong. *Second*: Fong Lim Fong was admittedly a citizen of the United States. *Third*: Appellants' older brother, Fong Hung Fong (Fong Din Deck) is concededly the son of Fong Lim Fong, having been admitted as such in 1949. *Fourth*: Yee Song Mee is admittedly the mother of Fong Lim Fong. *Fifth*: Ruby Fong Lee is admittedly the sister of Fong Lim Fong. *Sixth*: William Y. Fong is admittedly the brother of Fong Lim Fong. *Seventh*: These four admitted relatives of Fong Lim Fong appeared and testified in the Court below. *Eighth*: Appellee was offered the opportunity in the Court below of putting into evidence "any of the Immigration records or anything else that they

have" (T. 83) and did not avail himself of that opportunity; consequently it may be assumed that the immigration records are consistent with the family background as related by these witnesses, for otherwise appellee would have been quick to introduce such records in evidence when invited to do so by appellants. *Ninth*: It is undisputed that the photograph (Plaintiffs' Ex. 3) was taken by the aunt in the home village of Fong Lim Fong's family in 1936 and that the persons shown in the photograph are the grandmother, the previously admitted child (Fong Hung Fong) and the appellant Fong Hung Wing.

It is therefore clear that much is known about the family to which appellants claim to belong and about the four relatives who testified as witnesses in support of their claim. It is, of course, unfortunate that the Consular file covering the application of appellants for travel documents has become lost, since if available it would doubtless show the appearance of Jee Shee, appellants' mother, at the Consulate with them. However, the loss of the file is not the fault of appellants and the repeated protestations that appellee knows nothing of appellants seem somewhat hollow. The same might be said of any person who seeks to establish relationship to another. If a denial of recognition as a citizen could be based upon the mere fact that the claimant was unknown to the official receiving the application, few citizens could hope to be recognized as such by such officials. We wonder if there is not a disposition on the part of appellee to "purposely turn his head and close his eyes and

ears for the purpose of avoiding knowledge and information'' (*Dahlstrom v. Gemunder*, supra).

Executive efforts to fashion a different gauge for measuring the citizenship rights of Chinese persons from that applied to persons of other races have been lengthy and persistent. At one time it was even contended that a person born in the United States of Chinese parentage was not a citizen, and it took a decision of the Supreme Court to dispose of that one (*United States v. Wong Kim Ark*, 169 U. S. 649, 18 S. Ct. 456, 42 L. Ed. 890). It was then attempted by administrative regulation to exclude Chinese children from the benefits of Section 1993 of the Revised Statutes. That move was halted by this Court.

Quan Hing Sun v. White (C.A. 9) 254 F. 402, 405.

See also:

30 Opn. A. G. 529.

There was also an unsuccessful attempt to exclude Chinese children of citizens if they did not come to the United States before attaining the age of 21, although no such requirement was then contained in the statute.

Ex parte Tom Toy Tin (D. C., N.D., Cal.) 230 F. 747;

Ex parte Ng Doo Wong (D. C., N. D., Cal.) 230 F. 751.

Finally there was an attempt to hold that a Chinese person seeking admission as a citizen was not entitled to a hearing before a Board of Special Inquiry, although that right was accorded all other applicants for

admission either as aliens or citizens. This Court, of course, struck down that attempt.

Quan Hing Sun v. White, supra;

Jeong Quey How v. White, 258 F. 618, cert. den. 251 U.S. 559, 40 S.Ct. 180, 64 L.Ed. 414.

The continued executive hostility to the policy of the statute so far as it applied to Chinese children was noticed by the late Judge Dooling as early as 1916, as follows:

“I conceive it to be the duty of executive as well as of judicial officers fairly and freely to administer the laws of Congress as they find them, whether they agree with the policy or purpose of such laws or not. In the instant case the very law which would entitle the applicant to admission into this country is regarded with such hostility as to be cast into the balance against him. If applicant is the son of a resident American citizen, he, too, is a citizen, and entitled to every right as such. The question of relationship should therefore be fairly investigated with a view to ascertain the truth, and with a perfect willingness to admit him as a citizen under this law instead of being investigated in a spirit hostile to the law which, lacking the power to repeal, accomplishes the same result by denying to it effect.”

Ex parte Lee Dung Moo (D. C., N. D., Cal.) 230 F. 746, 747.

Appellee's continued protestation that these are unknown children (who with an indeterminate number of other unknowns “deluged” the consulate as ap-

plicants for travel documents) seems to reflect some of this executive impatience with the policy of the statutes conferring citizenship upon children born in China of American-citizen parents. In any event it fails to justify rejection of the positive, uncontradicted and unimpeached evidence presented in this case.

In his discussion of the findings of the Court below, appellee cites a number of early decisions wherein certain evidence offered by the claimant was held to be insufficient to establish citizenship. Those cases are not in point. In none of those cases did six members of a family give direct, positive, uncontradicted and unimpeached testimony on an issue of relationship. Moreover, any attempt to deduce from those cases the theory that testimony of Chinese witnesses *per se* is afflicted with a basic infirmity must fail. While there have been early cases in the lower Courts in which such a view was either expressed or implied, that doctrine has long since been flatly rejected by this Court (*Yee Chung v. United States*, 243 F. 126, 130; *Lau Hu Yuen v. United States*, 85 F.(2d) 327, 330).

Appellee also cites *U. S. v. Manzi*, 276 U. S. 463, to the effect that when doubts exist concerning a grant of citizenship they should be resolved against the claimant. But that was a *naturalization* proceeding, wherein the individual was petitioning for the *grant* of citizenship as a matter of grace. In the case at bar if these appellants are the children of Fong Lim Fong they were citizens of the United States at birth. Here

the suit is simply one to determine that fact. We submit that such an issue when it arises in an action under Section 903, *supra*, is determinable under the principles and standards applicable generally to the trial of such issues in civil causes in the Federal Courts. We have demonstrated in our opening brief that under those principles and standards a finding cannot rest upon mere speculation, conjecture, surmise, guess or suspicion, and that positive, uncontradicted and unimpeached testimony cannot be disregarded.

Appellee stresses the line of Supreme Court cases which established the proposition that Congress may constitutionally commit the determination of citizenship claims to executive officers where the applicant is seeking admission, at least if he has never been in the United States. We have already pointed out that these appellants have not relied upon any supposed constitutional right to a judicial determination of their claim, but are in Court under *a statute* which *expressly* gives the right to sue to *any person* who claims a right or privilege as a national and who has been denied such right or privilege by the executive officers (8 U. S. C. sec. 903, *supra*).

With regard to the decisions of this Court in *Go Lun v. Nagle*, 22 F.(2d) 246, *Gung You v. Nagle*, 34 F.(2d) 848, *Quan Toon Jung v. Bonham*, 119 F.(2d) 915 and *Wong Tsick Wye et al. v. Nagle*, 33 F.(2d) 226, which we cited in our opening brief to demonstrate that a finding against the appellants on the evidence here presented would not withstand appellate

review even if made by an administrative tribunal whose decisions possess statutory finality, appellee contents himself with replying that in those cases this Court was in error. It is undoubtedly superfluous for us to remark that disregard of unimpeached and uncontradicted testimony, such as is presented here, has always been held to constitute abuse of discretion on the part of an administrative tribunal and to render the decision subject to being set aside on *habeas corpus*.

Appellee states that some of the other cases cited in our opening brief involved deportation of persons claiming to be native-born citizens. That is a distinction without a difference. Those particular cases clearly establish the proposition that even in judicial deportation proceedings uncontradicted and unimpeached testimony cannot be disregarded by the trial Court, that the evidence may not be rejected because the witnesses are Chinese, that the evidence must be weighed in the light of the party's ability to produce evidence and that the requirement as to proof is that it satisfy "reasonable judicial standards". Measured by those settled principles, we submit that the judgment in the case at bar cannot be sustained.

Appellee cites *Ex parte Lung Wing Wun*, 161 F. 211, as support for his contention that the testimony of appellants and their older brother has little weight. In that case, however, it was simply held that the bare testimony of an individual *as to the place of his birth*, being hearsay, "is entitled to little credence,

unless corroborated.” In the case at bar the testimony of the appellants as to the relationship is fully corroborated by the uncontradicted testimony of four other close relatives.

Appellee’s attempt to attack the grandmother’s testimony (brief p. 64) is based upon premises which do not exist. In the first place appellee is in error in stating that “at no time did she testify seeing the first grandson, Fong Din Deck, aka Fong Hung Fong, in China”. This statement, and appellee’s mention of alleged inconsistencies, reflect an incomplete reading of the transcript. At the very outset, the grandmother gave the following testimony:

“Q. (by Mr. Hertogs). I will show you Plaintiff’s Exhibit number 3 for identification and ask you if you can identify those individuals from left to right, please?

A. The woman sitting in the front is Lim Fong’s wife, my daughter-in-law, Jee Shee. Then, from left to right, Fong Ngar Jing, my granddaughter, the daughter of my son, Fong Lim Fong. Fong Hung Wing, also known as Fong Lim, my grandson, the son of Lim Fong. Fong Wone Jing, who is Lim Fong’s daughter, and Fong Hung Fong, who is Lim Fong’s first son.” (T. 27-28).

“Q. (by Hertogs). Did you make a trip to China in about 1934, ’35?

A. In 1935.

Q. You made a trip to China?

A. Yes.

Q. And where did you make this trip? What place?

A. To the village, the Gong Mee Village.

Q. And in what district is the Gong Mee Village located?

A. Toyshan District.

Q. And who was residing in the Gong Mee Village at that time?

A. *When I arrived in China, Fong Lim Fong, his wife, his first son, and his first daughter were residing in the house. About two or three months after my arrival there, his second son was born in the house.*

* * * * *

Q. Was your son, Fong Lim Fong, and Jee Shee residing together in the Gong Mee Village as husband and wife at the time of your trip in 1935?

A. Yes, they were husband and wife and they resided there with their children." (T. 28-29).

Consequently the witness had already identified Fong Hung Fong as the first son, had testified that he and the first daughter were living in the family home when the witness arrived in China and had further testified that the second son was born there two or three months after her arrival. Moreover, she identified the photograph (Plaintiffs' Exhibit 5) as having been taken in the Gong Mee Village in 1936 and identified the infant she is carrying in the picture as Fong Hung Wing and the other child as Fong Hung Fong (T. 33-34).

Appellee contends that the grandmother testified that Fong Hung Wing was living with her son when she arrived in China (T. 30). He bases this on the

recorded answer to one question, whereas any fair reading of her testimony as a whole will demonstrate that this was obviously an inadvertent transposition of the name "Fong Hung Wing" for the name "Fong Hung Fong", and that the error may well have been either in the interpreting or in the recording of the answer. These Chinese names are difficult to follow when several rather similar-sounding names are involved in running testimony, and the Court itself at about that point found it necessary to slow down the interrogation to avoid just such confusion (T. 31). Elsewhere the grandmother properly described, named and identified *each* of the children *several times* (T. 28, 31-32, 34, 35) without confusion or error of any kind.

It also appears that there was similar inadvertent transposition of the name "Fong Ngar Jing" for "Fong Hung Wing" in relation to the birth of the second boy (T. 30), since her testimony is clearly to the effect that Fong Ngar Jing is her granddaughter (T. 28, 32) who was born after witness returned to the United States (T. 35).

No notice was taken of these alleged inconsistencies in the Court below, which is a further indication that they were but inadvertent misstatements or misunderstandings either on the part of the witness, the interpreter or the recorder.

Appellee also appears to attach some adverse significance to an alleged change of testimony by appellants' aunt, as follows:

“Q. While you were in China was the third child born?

A. No, he was not born yet.

The Court. After you returned?

The Witness. No—excuse me, he was born while I was there.” (T. 76).

We submit that the attempt to attach an adverse implication to this momentary inadvertence of the witness is without substance or merit. Such inadvertent mistakes are to be expected from the most fluent witness.

Appellee also contends that the testimony of the grandmother and the aunt is of little weight because they had not seen any of these appellants since the latter were small children. But the grandmother and the aunt knew that Fong Lim Fong and his wife, Jee Shee, had such children, they had seen the children Fong Wone Jing and Fong Hung Wing, and had been notified of the subsequent birth of the child Fong Ngar Jing. Moreover, they produced a photograph taken by the aunt in China showing the grandmother with the child Fong Hung Wing and his older brother Fong Hung Fong. Fong Hung Fong (whose identity is conceded) is here also, and he has identified the appellants as the brother and sisters who lived with him in China until he came to the United States in 1949. The appellants' testimony is to the same effect. Certainly all this testimony cannot be summarily discarded. Obviously it is sufficient to establish the claimed relationship, under “reasonable judicial stand-

ards'' (*Ching Hong Yuk v. United States* (C.A. 9) 23 F.(2d) 174, 175).

We submit that nothing in appellee's brief furnishes any justification for the rejection of the positive, uncontradicted and unimpeached testimony of the seven witnesses on the issue of appellants' relationship to Fong Lim Fong, the citizen father.

CONCLUSION.

It is, of course, unfortunate that some 700 of these cases are pending in the Court below. We think it would be more unfortunate if such recourse had not been open to persons whose claims of citizenship were rejected by consular officers abroad (and who were thus prevented from coming to the United States), without even the procedural safeguards usually attaching to administrative processes, such as a hearing at which the party may have counsel, may introduce witnesses and depositions, is advised of the reasons for an adverse decision, and is afforded an appeal to a reviewing body on the basis of a transcript which is open to his inspection. Absent even these rudimentary safeguards, is it surprising that the rejected applicants invoked the remedy provided by 8 U. S. C. section 903, *supra*? They had no other recourse.

In any event, we submit that appellee's challenge to the jurisdiction of the trial Court in the case at bar is without merit, that the citizenship of these

appellants was clearly established by the evidence and that the findings of fact are clearly erroneous.

We respectfully submit that the judgment should be reversed.

Dated, San Francisco, California,
November 30, 1953.

Respectfully submitted,

JACKSON & HERTOGS,

JOSEPH S. HERTOGS,

ARTHUR J. PHELAN,

Attorneys for Appellants.

No. 13,745

IN THE

United States Court of Appeals
For the Ninth Circuit

WILLIAM Y. FONG, as Guardian ad
Litem for FONG WONE JING, FONG
HUNG WING and FONG NGAR JING,
Appellants,

VS.

JOHN FOSTER DULLES, as Secretary of
State,
Appellee.

Upon Appeal from the United States District Court
for the Northern District of California,
Southern Division.

APPELLANTS' PETITION FOR A REHEARING.

JOSEPH S. HERTOGS,

580 Washington Street, San Francisco 11, California.

*Attorney for Appellants
and Petitioners.*

FILED

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U. S. DISTRICT COURT

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APPELLANTS' PETITION FOR A REHEARING.

*To the Honorable William Denman, Chief Judge, and
to the Honorable Clifton Matthews and Honorable
Homer T. Bone, Associate Judges of the United
States Court of Appeals for the Ninth Circuit:*

Appellants in the above-entitled cause, present this,
their petition for a rehearing of the above-entitled
cause, and in support thereof, respectfully show:

I.

That this petition for rehearing is predicated upon favorable consideration of the Motion to Correct Error heretofore filed in this Court.

II.

That this Court in its decision dated August 18, 1954, stated:

“We think the evidence sustains the findings of the court. As to one of the appellants the proof is that she was born more than one year after her alleged father’s departure from China. As to another, a girl, there was testimony she is a boy. As to the third, there is testimony that he was living with his family in China in 1935, whereas the pleadings and proof show he was not born until 1936.”

III.

That the corrected record reflects facts contrary to the expression of this Court as quoted above, to-wit:

(a) Fong Lim Fong, alleged father of appellant Fong Wone Jing, arrived in the United States six months and ten days prior to her birth;

(b) That the name of the child born on January 30, 1936, is Fong Hung Wing (T. 30); that this child was a boy as indicated by the testimony of the witness Yee Song Mee.

(c) That at the time of arrival of Yee Song Mee in China in 1935 there was then residing with

Fong Lim Fong and his wife Jee Shee in the Gong Mee Village their son Fong Hung Fong and their daughter Fong Wone Jing (T. 30). That the son Fong Hung Fong was born in China on November 3, 1932 (T. 52).

IV.

That the decision of this Court was based upon inadvertent defects and errors appearing in the Transcript of Record; that the corrected record shows uncontroverted evidence establishing the claimed relationship and United States nationality of these appellants; and that the appellants have sustained the burden of proof in accordance with the principle announced by this Court in *Ly Shew v. Dulles*, Case No. 13,808, decided August 18, 1954.

For the reasons stated above, appellants request that a rehearing be granted and that on such rehearing the judgment of this Court and the United States District Court be reversed.

Dated, San Francisco, California,
September 15, 1954.

Respectfully submitted,

JOSEPH S. HERTOGS,

*Attorney for Appellants
and Petitioners.*

CERTIFICATE OF COUNSEL

I hereby certify that I am counsel for appellants and petitioners in the above-entitled cause and that in my judgment the foregoing petition for a rehearing is well founded in point of law as well as in fact and that said petition for a rehearing is not interposed for delay.

Dated, San Francisco, California,
September 15, 1954.

JOSEPH S. HERTOGS,
*Attorney for Appellants
and Petitioners.*

No. 13,745

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JOSEPH S. HERTOGS,

580 Washington Street, San Francisco 11, California.

*Attorney for Appellants
and Petitioners.*

FILED

DEC 22 1954

**PAUL P. O'BRIEN,
CLERK**

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*To the Honorable William Denman, Chief Judge, and
to the Honorable Clifton Mathews and Honorable
Homer T. Bone, Associate Judges, of the United
States Court of Appeals for the Ninth Circuit:*

Appellants in the above-entitled cause, present this,
their petition for a rehearing of the above-entitled
cause, and in support thereof respectfully show:

I.

This Court in its decision dated November 23, 1954 concluded that the appellants had failed to prove that they had been denied a right or privilege as a national of the United States by any Department or agency, or executive official thereof, upon the ground that he or she was not a national of the United States. We believe this conclusion is in error for the following reasons:

1. The appellee in his opening statement admitted that the appellants had been denied by the American Consulate General in Hong Kong, an official executive of the appellee herein.
2. The appellee in his opening statement admitted that the appellants came to the United States on Certificates of Identity which are only issued after the American Consulate is satisfied that the holders thereof have been denied a right or privilege by a governmental department or agency.
3. That the appellee in his answer denied that the appellants "are the true and lawful blood children of Fong Lim Fong", a recognized United States citizen.
4. That the lower court refused a Conclusion of Law proposed by the appellee that the appellee had not denied a right or privilege to appellants as nationals or citizens of the United States.
5. That the affirmative averments of the complaint with regard to this issue were not denied.

1.

In the earlier opinion, dated August 18, 1954, this Court found that "At the hearing, counsel for appellee admitted in his opening statement that the claimed applications and denials thereof had occurred." This conclusion was supported by the record. Appellee admitted in his opening statement that counsel for the appellants had permitted counsel for appellee to review his entire file. (T. 21.) This file included the letters of the American Consulate General at Hong Kong dated January 24, 1952 denying documentation as well as the Certificates of Identity which permitted appellants to proceed to the United States. All of these facts were known when appellee, in his opening statement (T. 20), stated "we do not know why the *Consul denied* them in the first place." (Emphasis added.)

Neither in his opening statement, his evidence, nor his closing arguments did appellee in any way indicate that he was attempting to rely upon such a defense. The reasons are obvious. He conceded that the appellants had filed applications, as alleged in the complaint, and that the American Consulate General had denied them. We concede that he did not at that time know the reasons for the Consular denial but that neither defeats nor diminishes the fact that he admitted a denial in the opening statement.

2.

Appellants in their opening statement alleged that they had been issued Certificates of Identity by the

American Consul General, Hong Kong, on March 5, 1952 and that they arrived in the United States on April 6, 1952. (T. 19.) Appellee in his opening statement admitted that appellants had come forward on Certificates of Identity and that pursuant to 8 C.F.R. 112.2 (Immigration regulations promulgated under Section 503 of the Nationality Act of 1940) that they are to be regarded as aliens until otherwise finally held by the Court. (T. 21.)

Issuance of Certificates of Identity under the expressed provisions of Section 503 of the Nationality Act of 1940 are governed by Department of State regulations. No Certificate of Identity is issued by an executive official of the Department of State until he has determined that the applicant therefor has been denied a right or privilege upon the ground that he is not a national of the United States.

All of the Department of State regulations pertaining to the issuance of Certificates of Identity for admission to the United States to prosecute an action under Section 503 are set forth in 22 C.F.R. Sec. 50.18 to Sec. 50.29.

Sec. 50.19 relating to the application for a Certificate of Identity states, inter alia, that the application shall show:

(3) That he claims to be a national of the United States, and the basis of such claim and evidence submitted in support thereof;

(4) That such claim is made in good faith and upon a substantial basis;

(5) That he claims a right or privilege as a national of the United States, and specifically the nature of such claim;

(6) That such right or privilege has been denied him by a specific department or agency or executive official of the United States on the ground that the applicant is not a national of the United States, and the date and place of such denial;

(7) That an action for a judgment declaring applicant to be a national of the United States has been instituted by him * * *;

Sec. 50.20 provides:

“Independent Investigation

When an application for a certificate of identity is executed before a diplomatic or consular officer, an independent investigation of the facts in the case should be made, as far as practicable, by such officer, even though the application and proofs submitted therewith may on their face appear to justify issuance of a certificate of identity.”

Section 50.21 which relates to “Good faith and substantial basis of claim of United States nationality” further limits the issuance of such documentation. Subparagraph (c) thereof reads as follows:

“Meaning of Substantial basis. A substantial basis of a claim of United States nationality means one which satisfies the diplomatic or consular officer of the United States that the claim of the applicant that he is a national of the United States is, notwithstanding any previous

ruling of a department, agency or executive official of the United States, sufficiently meritorious to justify resort to the court for a determination of the question.”

All parties to this action admit that appellants were issued Certificates of Identity by the American Consulate General at Hong Kong. In their complaint appellants allege that their applications for issuance of United States passports were denied by this same executive official, a subordinate of the appellee herein, prior to issuance of such documentation and affirmatively determined that appellants had been denied a right or privilege upon the ground that they were not nationals of the United States.

By issuance of the Certificate of Identity, the American Consulate General at Hong Kong admitted and confirmed the fact that these appellants had been denied a right or privilege upon the ground that they were not nationals of the United States. These admissions by the American Consulate General at Hong Kong, a subordinate of appellee and also the executive official responsible for the original rejection, are binding upon the appellee herein. The appellee in his opening statement, and throughout his argument to this Court, has admitted that the American Consulate General did issue such Certificates of Identity.

In other words, appellee in his opening statement knew and admitted that appellants' applications for United States passports had been denied. (See 22 C.F.R. 50.22.)

We do not deny that appellants had the burden of proof of all material allegations in the Court below. However, it makes no difference whether such facts are developed by evidence or admitted by counsel. In this case the facts pertaining to the denial were admitted by counsel and then no further proof was required.

3.

The complaint alleged in substance that appellants were the lawful blood children of Fong Lim Fong, a recognized United States citizen who had resided in the United States prior to their birth; and therefore appellants acquired United States citizenship (nationality included) at the time of their respective births pursuant to the statutes then in effect.

We have in the answer the incongruous situation where the appellee specifically denies (not on knowledge, information or belief (T. 8)) that appellants are the blood children of an American citizen, while at the same time appellee on the ground that "defendant has no knowledge, information or belief" denies (T. 9) the pleadings pertaining to processing of the applications by his own department. The whole answer should be treated as an entirety. By his answer appellee denied that appellants were nationals of the United States. (T. 10.)

This Court in *Law Don Shew v. Dulles*, Case No. 13762, decided November 24, 1954, stated that such an answer, in effect, denied that appellants were nationals of the United States. This Court further stated

“On the issue thus raised, appellant had the burden of proof, which is to say, the burden of proving that he was the son of Law See Chew.”

4.

In accordance with the Order for Judgment (T. 11), counsel for appellee lodged in the District Court Findings of Fact and Conclusions of Law. The District Court refused to make a Conclusion of Law that defendant had not denied a right or privilege to appellants as nationals or citizens of the United States.

The District Court, at least tacitly, proceeded on the theory that the appellee admitted that appellants had been denied a right or privilege as nationals of the United States on the ground that they were not nationals thereof. Candor upon the part of counsel who participated in the trial would reveal such to be the true state of facts. At no time in the lower Court did counsel urge that these appellants had not been denied such a right or privilege.

In *Fontes v. Porter*, 156 F2d 956, 957, this Court held that “neither proof nor finding is requisite in respect of uncontested issues.” Even more recently this Court has stated that unless clearly erroneous a finding of the District Court will be accepted as true. See *Law Don Shew v. Dulles*, *supra*, and citations in footnote 7.

Even though the District Court did not make a specific finding with regard to this issue, that Court

in rejecting appellee's lodged Findings of Fact and Conclusions of Law, reached a determination contrary to the present decision. The District Court rejected appellants' claim solely upon the ground that the evidence of relationship presented by appellants did not conform to the standard of proof fixed by *Ly Shew v. Acheson*, 110 F. Supp. 50.

This Court in reaching the present decision relies upon considerations which were not urged in the District Court and were not advanced as grounds for appeal in appellee's original reply brief. Compare *Brooks v. Woods*, 9 Cir. 181 F2d 716. This is the first time that this particular question has been injected into a case of this nature. It is seriously urged that the failure of appellee to assert such a defense should be regarded unfavorably. We assert that appellee cannot honestly come before this Court and state that appellants were not denied passports by the American Consulate General at Hong Kong on or about January 24, 1952.

5.

The appellants, in their complaint, allege that they filed applications for United States passports on January 24, 1951 and May 10, 1951; that they were advised by the American Consulate General at Hong Kong on or about January 24, 1952 that their applications had been denied; and that they were denied rights or privileges as nationals of the United States by an official executive of the appellee on that date. (T. 5-7.) In addition, appellants quoted from the

official correspondence received from the American Consulate General at Hong Kong dated January 24, 1952. These allegations were denied¹ by appellee on the ground "defendant has no knowledge, information or belief".

Rule 8(b) of the Federal Rules of Civil Procedure provides that a defendant may "if he is without knowledge or information sufficient to form a belief as to the truth of an averment" deny the allegations upon that ground. However, any such denial must be made in good faith.

If appellee had sufficient knowledge to file a responsive pleading denying the claim of relationship (T. 8), the claim of nationality (T. 10), and affirmatively allege in his answer that appellants "are, in fact, aliens and citizens of China" (T. 10), his answer denying information or knowledge with regard to his own actions must be treated as sham or frivolous.

Over a long period of time Courts have emphatically disapproved of the practice of making use of pro forma denials when the party can inform himself of the true facts without the slightest effort. Neither has a party the right to categorically deny an allegation when he knows or has reason to believe the

¹There is considerable doubt concerning the sufficiency of such a pleading as a denial since it is not couched in the form prescribed by Rule 8(b) of the Federal Rules of Civil Procedure. It is not specific nor is it directed to any particular allegation of the complaint. If such denial is not a responsive pleading and, therefore, has no effect, the affirmative allegations stand uncontroverted.

same to be true. Appellants in their pleadings quoted from official correspondence received from an executive of appellee. Appellee made no effort to determine whether the appellants had ever filed formal applications for passports as alleged, even though such records are maintained in his office.

Appellee could have informed himself with the slightest of effort. The allegations of the complaint were plainly and necessarily within the appellee's knowledge. His averment of ignorance must be palpably untrue. Without being reptitious, we once again refer to his specific denial of other allegations of the complaint which could only be made if he had knowledge concerning this matter. At the time appellee's answer was filed, the Department of State official records were available.

Paragraphs VI and VII of appellee's answer denying the specific allegations of similar numbered paragraphs of appellants' complaint should be regarded as a nullity. The facts presumably as a matter of law were within the knowledge of appellee. The facts of the complaint alleging a denial stand undisputed.

Oregon Mesabi Corp. v. C. D. Johnson Lumber Corp. (C.A. 9) 166 F2d 997, 1001; cert. den. 334 U.S. 837, 68 S. Ct. 1494, 92 L. Ed. 1762;
Lloyd Sabaudo Societa Anonime Per Azioni v. Elting (D.C., S.D., N.Y.) 46 F2d 315;
Nieman v. Bethlehem Nat. Bank (D.C., E.D., Pa.) 32 F. S. 436;

Christmas v. City of Asbury Park (D.C., N.J.)
 10 F. S. 22, 25;
Reed v. Turner (D.C., E.D., Pa.) 2 F.R.D. 12.

See also:

71 C.J.S. 259;
Peacock v. United States (C.A.9) 125 F. 583,
 586-587.

Under the circumstances of this case the denial on no knowledge or information respecting the matters heretofore discussed does not fall within the scope of Rule 8(b) authorization. Such denial was improper and fails to meet the requirement of good faith. It clearly appears from other parts of the answer that appellee had knowledge and information sufficient to admit or deny the facts alleged.

The decision of this Court rests upon an issue raised by a patently false denial that defendant had no knowledge, information or belief concerning a matter handled solely by his administrative agency.

II.

Appellant's Petition for a Rehearing in *Chow Sing v. Herbert Brownell, Jr.*, No. 13746, filed this date, is incorporated herein and made a part of this brief.

CONCLUSIONS.

The liberty, freedom, and future lives of these appellants are seriously impaired by the decision of this

Court. Upon a technical nicety, which was never urged by the defendant in the lower Court, their right to a judicial determination of United States nationality as provided by Congressional enactment is to be denied. The ends of justice would be better served by affording appellants an opportunity to present their claim.

For the reasons stated above, appellants request that a rehearing be granted and that on such rehearing the judgment of this Court be reversed.

Dated, San Francisco, California,
December 22, 1954.

Respectfully submitted,

JOSEPH S. HERTOGS,

*Attorney for Appellants
and Petitioners.*

CERTIFICATE OF COUNSEL

I hereby certify that I am counsel for appellants and petitioners in the above-entitled cause and that in my judgment the foregoing petition for a rehearing is well founded in point of law as well as in fact and that said petition for a rehearing is not interposed for delay.

Dated, San Francisco, California,
December 22, 1954.

JOSEPH S. HERTOGS,
*Attorney for Appellants
and Petitioners.*

No. 13746

United States
Court of Appeals
for the Ninth Circuit.

CHOW SING, by His Guardian ad Litem, CHOW
YIT QUONG,

Appellant,

vs.

HERBERT BROWNELL, JR., Attorney General
of the United States,

Appellee.

Transcript of Record

Appeal from the United States District Court for the
Northern District of California
Southern Division

FILED
JUL 14 1953
FALL 1953

No. 13746

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF ATTORNEYS

JACKSON & HERTOGS,
JOSEPH S. HERTOGS, ESQ.,
580 Washington Street,
San Francisco, California,
Attorneys for Appellant.

CHAUNCEY TRAMUTOLO, ESQ.,
United States Attorney,
CHARLES ELMER COLLETT, ESQ.,
Assistant United States Attorney,
San Francisco, California,
Attorneys for Appellee.

In the United States District Court in and for the
Northern District of California, Southern Division

No. 30820

CHOW YIT QUONG, as Guardian Ad Litem for
CHOW SING,

Plaintiff,

vs.

J. HOWARD McGRATH, Attorney General of the
United States of America,

Defendant.

PETITION FOR DECLARATORY JUDGMENT
UNDER SECTION 503 OF THE NATIONALITY ACT OF 1940

Comes Now the plaintiff, Chow Sing, by his guardian ad litem, Chow Yit Quong, complains of the defendant and for cause alleges:

I.

For the purpose of this action, Chow Yit Quong was appointed by the above-entitled Court and now is the guardian ad litem of plaintiff, Chow Sing, minor.

II.

That the said plaintiff is the true and lawful blood son of Chow Yit Quong, a citizen of the United States; that as evidence of his United States citizenship, Chow Yit Quong holds Certificate of Identity No. 47426 issued September 12, 1923, by the Immigration Service at San Francisco, California;

III.

That the said plaintiff arrived at the Port of San Francisco, State of California, ex SS "President Wilson" on August 23, 1950, seeking admission as a citizen of the United States, such citizenship having been acquired under the provisions of Section 1993, Revised Statutes of the United States, as amended by the Act of May 24, 1934 and Section 201(g) of the Nationality Act of 1940 (8 U.S.C.A. 601(g));

IV.

That the defendant is the duly appointed and acting Attorney General of the United States; that the plaintiff applied to the Immigration and Naturalization Service at San Francisco, State of California, an official executive of the defendant herein, for recognition and admission to the United States as a citizen thereof; that the said Immigration and Naturalization Service at San Francisco, State of California, did on or about the 19th day of October, 1950, deny this plaintiff's application for admission and recognition as a United States citizen; that the Commissioner, Immigration and Naturalization Service, and the Board of Immigration Appeals, both of Washington, D. C., have affirmed said excluding decision; and that such plaintiff has exhausted his administrative remedies;

V.

That the said plaintiff is now and has been since the time of his arrival at the port of San Francisco, State of California on August 23, 1950, physically

present within the jurisdiction of this Court; and that said plaintiff claims permanent residence within the jurisdiction of this Court.

VI.

That this complaint is filed and these proceedings instituted against the defendant under Section 503 of the Nationality Act of 1940 (54 Stat. 1171, 1172; 8 USC 903) for a judgment declaring plaintiff to be a national of the United States;

VII.

That the said plaintiff has never committed any act nor executed any instrument of expatriation nor renounced his United States citizenship and is entitled to be declared a citizen of the United States;

Wherefore, plaintiff prays for judgment declaring him to be a national of the United States and for such other and further relief as may be just and proper.

JACKSON & HERTOGS,

/s/ JOSEPH S. HERTOGS,
Attorney for Plaintiff.

[Endorsed]: Filed August 17, 1951.

[Title of District Court and Cause]

ANSWER

Comes Now J. Howard McGrath, Attorney General of the United States of America, defendant in the above-entitled action, by and through his

attorneys, Chauncey Tramutolo, United States Attorney, and Edgar R. Bonsall, Assistant United States Attorney, and in answer to plaintiff's complaint, admits, denies and alleges as follows:

I.

Answering Paragraph I of the Complaint, defendant admits the allegations contained in Paragraph I of the Complaint.

II.

Answering Paragraph II of the Complaint, defendant affirmatively asserts that plaintiff is not the true and lawful blood son of Chow Yit Quong. Defendant has no knowledge, information or belief as to the other allegations contained in Paragraph II of the Complaint and therefore denies the same.

III.

Answering Paragraph III of the Complaint, defendant admits that plaintiff arrived at the Port of San Francisco, State of California, ex SS "President Wilson" on August 23, 1950, and applied for admission as a citizen of the United States. Defendant affirmatively asserts that plaintiff did not acquire United States nationality or citizenship under the provisions of Section 1993, Revised Statutes of the United States, as amended.

IV.

Answering Paragraph IV of the Complaint, defendant admits the allegations contained in Paragraph IV of the Complaint.

V.

Answering Paragraph V of the Complaint, defendant admits the allegations contained in Paragraph V of the Complaint.

VI.

Answering Paragraph VI of the Complaint defendant admits the allegations contained in Paragraph VI of the Complaint.

VII.

Answering Paragraph VII of the Complaint, defendant affirmatively asserts that plaintiff is not entitled to be declared as a citizen of the United States. Defendant has no knowledge, information or belief as to the other allegations contained in Paragraph VII and therefore denies the same.

Wherefore, defendant prays that each and every relief sought by the plaintiff be denied; that this Court declare a judgment in favor of the defendant that plaintiff has never been a citizen of the United States and that defendant receive his proper costs against the plaintiff in this action.

/s/ CHAUNCEY TRAMUTOLO,
United States Attorney,

/s/ EDGAR R. BONSALE,
Assistant United States At-
torney,
Attorneys for Defendant.

[Endorsed]: Filed October 23, 1951.

[Title of District Court and Cause]

INTERROGATORIES TO ADVERSE PARTY

To: Chow Sing, Plaintiff, and his attorneys, Jackson and Hertogs, 550 Washington Street, San Francisco, California.

James P. McGranery, Attorney General of the United States, defendant above named, hereby requests that Chow Sing answer under oath in accordance with Rule 33 of the Federal Rules of Civil Procedure the following interrogatories.

1. Did you arrive at the Port of San Francisco, California on August 23, 1950?

2. Were you excluded from admission to the United States by a Board of Special Inquiry and was your appeal to the Commissioner of Immigration and to the Board of Immigration Appeals dismissed?

3. Did you appear and testify under oath before Immigration Officer A. W. Pauzon under dates of September 19, 1950, and September 20, 1950, at the Immigration Office in San Francisco, California?

4. Did Officer Pauzon, referred to in Interrogatory No. 3, propound the following questions and did you respond with the following answers?

Board of Special Inquiry

Exhibit 13

Page 1—

Q. Do you swear to tell the truth, the whole truth and nothing but the truth, So Help You God?

A. Yes.

Q. You are informed that if you wilfully and knowingly give false testimony at this proceeding you may be prosecuted for perjury, the penalty for which is imprisonment of not more than five years and a fine of not more than \$2000, or both. Do you understand? A. Yes.

Page 2—

Q. When was your father married the second time?

A. He was married on January 12, 1947 in Canton City.

Q. Where were you at the time your father got married? A. In Canton City.

Q. Were you present at the marriage feast?

A. Yes.

Q. When was the first time you saw your step-mother? A. At the day of their marriage.

Q. Where did their marriage take place?

A. At the Baptist Church in Tung Shan District of Canton City.

Q. At what address or what place did the marriage feast take place?

A. At the Dai Som Yuen Restaurant, the Bund, Canton City.

Q. How many tables were set for this feast?

A. About ten tables.

Q. What members of your family were present at this feast?

A. I was the only one besides my father who were members of my family that were present there.

Page 5—

Q. Were you present at the wedding?

A. I was in Canton City, but I didn't go to the wedding.

Q. Did you go to the wedding feast?

A. I did go to the wedding feast.

Q. Describe the wedding feast, where it was held, and who was present at the feast?

A. The wedding feast was held at the Dai Som Yuen Restaurant. There were about ten tables of guests present. Some were my father's friends and some were the friends of my stepmother and relatives of my stepmother. My stepmother's parents, her elder sister, her brother-in-law and her nieces and nephews also were present at the feast.

5. Concerning your residence, did Officer Pauzon, referred to in Interrogatory No. 3, propound the following questions and did you respond with the following answers?

Board of Special Inquiry—Exhibit 13

Page 3—

Q. At what other places have you ever lived and for what periods?

A. I was born in Canton City and lived there until I was 5 or 6 years old, or the time of the Japanese invasion of Canton City. Then I moved to Macao and lived there until the fall of Hong Kong to the Japanese, or when I was about 7 or 8 years old. I then went to Kweiyang City and lived there until December, 1946. I then returned to Canton City and lived there until July this year when I

went to Hong Kong to arrange for my coming to the United States.

Page 6—

Q. Did your father and stepmother make a trip back to the Quan Tong Po Village after their marriage? A. No.

Q. Did you return to the Quan Tong Po Village? A. I never have been back.

Q. When was the last time you were in Quan Tong Po Village?

A. I don't even remember that village.

6. Did you state to Officer Pauzon, referred to in Interrogatory No. 3, at the close of the hearing that you had understood the interpreter and all the questions asked you?

7. Did you testify under oath before a Board of Special Inquiry convened at the Immigration Office in San Francisco on the following dates: October 9, 1950, October 11, 1950 and October 19, 1950.

8. Did the chairman of the Board of Special Inquiry, referred to in Interrogatory No. 7 propound the following questions regarding the Quan Tong Po Village and did you respond with the following answers?

Board of Special Inquiry Transcript

Page 22—

Q. In what house did you, your father, and stepmother stay at Quan Tong Po Village in 1947?

A. It was about in the center of the village. I was only there for a few days. It was raining and I couldn't go out.

Q. Describe the Quan Tong Po Village as it was when you claim to have seen it in 1947.

A. It was raining and I couldn't go out. I don't know how many houses there were or how many rows of houses.

Q. How many days did you stay in Quan Tong Po Village in 1947? A. About ten days.

Q. If you were actually in Quan Tong Po Village for about ten days, you should be able to give us a fairly good idea of how that village was laid out. Will you state how many house in all you saw in that village in 1947?

A. Thirty odd houses.

Q. And you say that the house in which you, your father, and your stepmother lived in 1947 was about in the center of those 30 odd houses in Quan Tong Po Village?

A. It is not exactly in the center but it is near the center.

Q. Is that house near the front or the rear of the village?

A. I don't know which side was considered the front and which side was considered the rear of the village.

Page 23—

Q. Were there houses in front of, and to the rear of the house in which you, your father, and stepmother lived in Quan Tong Po Village when you were there in 1947? A. Yes.

Q. Were there houses on each side of the house in which you persons then stayed? A. Yes.

9. Did the chairman of the Board of Special

Inquiry, referred to in Interrogatory No. 7, propound the following questions regarding the sleeping arrangement and the serving of meals in your home in Quan Tong Po Village and did you respond with the following answers?

Board of Special Inquiry Transcript

Page 23—

Q. What were the sleeping arrangements in that house during the days you, your father and stepmother lived there in 1947?

A. My father and my stepmother slept in the bedroom of that house and I slept in the parlor.

Q. Did you sleep in the same house with your father and your stepmother each and every night while you folks stayed at Quan Tong Po Village in 1947?

A. Yes.

Q. Where did you folks have your meals during that period?

A. In the parlor of that house.

Q. Did you, your father and stepmother, while living at Quan Tong Po Village in 1947, eat all of your meals in the same house where the three of you slept each night?

A. Yes.

10. In reference to your relatives, did the Chairman of the Board of Special Inquiry, referred to in Interrogatory No. 7, propound the following questions and did you make the following answers?

Board of Special Inquiry Transcript

Page 23—

Q. Has your father any brothers or sisters?

A. My father has one brother; his name is Chow

Sang Quong who is now in the United States. He has no sisters.

Page 24—

Q. Have you ever seen Chow Sang Quong?

A. No.

Q. Is he married? A. Yes.

Q. What family has he?

A. I know that he has a wife and some children but I don't know how many children.

Q. Have you ever seen any of Chow Sang Quong's children? A. No.

Q. Do you know the names of any of them?

A. No.

11. In reference to the death of your alleged mother and sister, did the Chairman of the Board of Special Inquiry, referred to in Interrogatory No. 7, propound the following questions and did you respond with the following answers?

Board of Special Inquiry Transcript

Page 15—

Q. Describe your blood mother.

A. Her name was Wong Suey Hung; she died in Macao in CR 32 (1943).

Q. Were you living in Macao at the time of your mother's death? A. Yes.

Q. At what place in Macao did your mother die?

A. At 123 Fai Jee Gay Street, 2nd floor, Macao.

Q. What was the exact date of your mother's death?

A. She died in the 2nd month of CR 32 (1943) but I don't know whether it was the 2nd month according to Chinese or western reckoning.

Q. When did you move to Macao?

A. I don't know exactly when it was but it was about the time the Japanese occupied Canton City.

Page 16—

Q. What year was that?

A. I don't remember.

Q. When did you move away from Macao?

A. Sometime after my mother died I moved to Kweiyang.

Q. In what year did you move to Kweiyang?

A. About CR 32 (1943).

Q. Where is your mother buried?

A. She is now buried somewhere near the Quan Tong Po Village. My father moved her body from Macao to the place near Quan Tong Po Village during his last trip to China.

Q. Did your father tell you that he had done so?

A. Yes.

Page 17—

Q. You then stated that your sister, Chow Soo (So), had died in Macao in CR 32 (1943). What was the exact date of her death?

A. I don't remember.

Q. Did she die before or after your mother died?

A. She died after my mother.

Q. About how long after your mother died was it did your sister die?

A. I don't remember.

Q. Was it a matter of days, weeks or months?

A. It was at least about a month after my mother died.

Q. Where is your sister buried?

A. In Macao.

Q. Was her body ever removed to a place near Quan Tong Po Village?

A. I don't know. All I know is that my mother's body was removed from Macao to a place near Quan Tong Po Village.

12. In reference to your residence in Kweiyang City, did the Chairman of the Board of Special Inquiry, referred to in Interrogatory No. 7, propound the following questions and did you respond with the following answers?

Board of Special Inquiry Transcript

Page 21—

Q. What were the sleeping arrangements for you and your brothers during the three years approximately you claim to have resided in Kweiyang City?

A. My brothers and I usually occupied the middle building. Chow See Hong, his wife, their two sons and one daughter usually slept in the 3rd or rear building.

Q. Was the middle building which you and your brothers occupied partitioned off in any manner into separate rooms? A. No.

Q. Were the sleeping quarters occupied by you and your brothers at 58 Fat Yuen Road in Kweiyang City on the same level as the first building counting from the front of that address?

A. Yes, about the same level.

Q. While living at 58 Fat Yuen Road, Kweiyang

City, did you and your brothers ever sleep in a wooden loft at that address? A. No.

Q. Now, while your father was with you those few days in Kweiyang City, where did he sleep?

A. In the first building, I think. I don't remember for sure.

Q. If someone were to say that there was a wooden loft in the premises at 58 Fat Yuen Road, Kweiyang City, while you lived there, and that there were several rooms in that wooden loft, what would you say?

A. I would say there are none.

13. Do you have a certificate of birth?

14. Do you have a transcript of your school records?

15. Do you have any old correspondence between your alleged father and yourself?

16. Do you have a Canton City ration card?

17. Do you have a Hong Kong identification card?

18. Do you have any photographs of yourself taken with any members of your family?

19. Do you have any documentary evidence whatsoever which would tend to establish the relationship claimed?

20. Do you intend to present any witnesses other than your alleged father at the time of the trial?

21. If so, what are the names, addresses and relationship, if any, to yourself?

/s/ CHAUNCEY TRAMUTOLO,
United States Attorney,

/s/ CHARLES ELMER COLLETT,
Assistant United States At-
torney,
Attorneys for Defendant.

[Endorsed]: Filed November 13, 1952.

[Title of District Court and Cause]

ANSWERS TO INTERROGATORIES

To James P. McGranery, Attorney General of the United States, defendant, and his attorneys, Chauncey Tramutolo, United States Attorney, and Charles Elmer Collett, Assistant United States Attorney, Post Office Building, Seventh and Mission Streets, San Francisco, California:

City and County of San Francisco,
State of California—ss.

Chow Sing, having been duly sworn, makes the following answers to interrogatories propounded to him by the defendant in the above-entitled case.

Answer to Interrogatory Number Three: "Yes."

Answer to Interrogatory Number Four: "Yes."

Answer to Interrogatory Number Five: "Yes as to page 3; No as to page 6."

Answer to Interrogatory Number Six: "No."

Answer to Interrogatory Number Seven: "Yes."

Answer to Interrogatory Number Eight: "Yes, except I did not state the village had 'thirty odd houses.' "

Answer to Interrogatory Number Nine: "Yes."

Answer to Interrogatory Number Ten: "Yes."

Answer to Interrogatory Number Eleven: "Yes."

Answer to Interrogatory Number Twelve: "Yes."

Answer to Interrogatory Number Thirteen: "No."

Answer to Interrogatory Number Fifteen: "Only one letter written after my arrival at San Francisco."

Answer to Interrogatory Number Eighteen: "Yes."

Answer to Interrogatory Number Nineteen: "Yes."

Answer to Interrogatory Number Twenty: "Yes."

Answer to Interrogatory Number Twenty-one: "Without binding myself to their appearance at time of trial, the following, So Tak, his wife, Susanville, California, no relation, Chow Sam, brother, San Francisco."

Dated: December 5, 1952.

/s/ CHOW SING.

Subscribed and sworn to before me this 5th day of December, 1952.

[Seal] /s/ L. RUTH WILBUR,
Notary Public, in and for the City and County of
San Francisco, State of California.

My commission expires February 8, 1953.

[Endorsed]: Filed December 5, 1952.

[Title of District Court and Cause]

ANSWERS TO INTERROGATORIES

To James P. McGranery, as Attorney General of the United States, and Chauncey Tramutolo, United States Attorney, and Charles Elmer Collett, Assistant United States Attorney, his counsel:

City and County of San Francisco,
State of California—ss.

Chow Yit Quong, having been duly sworn, makes the following answers as Guardian ad Litem for Chow Sing to interrogatories propounded to the said Chow Sing by the defendant in the above-entitled case.

Answer to Interrogatory Number Fourteen: "Transcript of the school records of Chow Sing were given to the Immigration and Naturalization Service and are not now in my possession."

Answer to Interrogatory Number Sixteen: "I had

a Canton City ration card which had to be surrendered at the time of my departure.”

Answer to Interrogatory Number Seventeen:
“No.”

Dated: November 24, 1952.

CHOW YIT QUONG,
As Guardian ad Litem for
Chow Sing.

[Endorsed]: Filed November 26, 1952.

[Title of District Court and Cause]

ORDER FOR JUDGMENT

The evidence presented by plaintiff does not conform to the standards fixed in *Ly Shew vs. Acheson*, #30159 and #31161, this day decided.

Hence judgment granting plaintiff's prayer is not warranted.

Judgment will go for defendant upon findings to be presented pursuant to the Rules.

Dated: January 12, 1953.

/s/ LOUIS GOODMAN,
United States District Judge.

[Endorsed]: Filed January 12, 1953.

[Title of District Court and Cause]

ORDER SUBSTITUTING
PARTY DEFENDANT

The motion for substitution of party defendant in this cause coming on to be heard before the Court, and the Court being fully advised in the premises, and it appearing that the defendant, James P. McGranery, Attorney General of the United States, has been replaced by Herbert Brownell, Jr., as Attorney General, it is by the Court this 17th day of February, 1953,

Ordered, that Herbert Brownell, Jr., as Attorney General, be and he is hereby substituted as party defendant in this cause in the place and stead of James P. McGranery, at Attorney General.

/s/ LOUIS GOODMAN,

Judge of the District Court.

[Endorsed]: Filed February 17, 1953.

[Title of District Court and Cause.]

FINDINGS OF FACT AND
CONCLUSIONS OF LAW

The above-entitled action came on for trial on the 8th and 9th days of December, 1952, before the above-entitled Court, Honorable Louis E. Goodman presiding, Joseph S. Hertogs, Esq., appearing as attorney for the plaintiff above named, and Chauncey Tramutolo, Esq., United States Attorney for the Northern District of California, and Charles Elmer Collett, Assistant United States Attorney for

said District, appearing as attorneys for the defendant above named, and the evidence having been received and the Court having fully considered the same, hereby makes the following Findings of Fact and Conclusions of Law.

Findings of Fact

I.

It is not true that the permanent residence and domicile of the person who claims to be plaintiff Chow Sing is within the Northern District of California, or in the United States of America.

II.

The person who claims to be plaintiff Chow Sing has failed to introduce evidence of sufficient clarity to satisfy or convince this Court that Chow Yit Quong is the natural blood father of the person known as Chow Sing, or that the person who appeared before the Court claiming to be plaintiff Chow Sing is in truth and in fact Chow Sing.

Conclusions of Law

The person appearing before the Court as plaintiff in this action is not entitled to the relief prayed for.

Let judgment be entered accordingly.

Dated: February 17, 1953.

/s/ LOUIS GOODMAN,

United States District Judge.

Lodged January 26, 1953.

[Endorsed]: Filed February 18, 1953.

In the United States District Court for the Northern District of California, Southern Division

No. 30820

CHOW YET QUONG, as Guardian ad Litem for
CHOW SING,

Plaintiff,

vs.

JAMES P. McGRANERY, Attorney General of
the United States,

Defendant.

JUDGMENT

The above-entitled action came on for trial on the 8th and 9th days of December, 1952, before the above-entitled court, Honorable Louis E. Goodman presiding, Joseph S. Hertogs, Esq., appearing as attorney for the plaintiff above named, and Chauncey Tramutolo, Esq., United States Attorney for the Northern District of California, and Charles Elmer Collett, Esq., Assistant United States Attorney for said district, appearing as attorneys for the defendant above named; the evidence having been received, the court having fully considered the same, and having filed herein its Findings of Fact and Conclusions of Law, and having directed that judgment be entered in accordance therewith,

Now, Therefore, It Is Hereby Ordered, Adjudged and Decreed:

I.

That the relief sought by the plaintiff, Chow Sing, be and the same is denied.

II.

That the defendant recover costs in this action
in the sum of \$.

So Ordered.

Dated: February 17, 1953.

/s/ LOUIS GOODMAN,
United States District Judge.

Lodged January 26, 1953.

[Endorsed]: Filed February 18, 1953.

Entered February 19, 1953.

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice is hereby given this 25th day of February, 1953, that Chow Sing hereby appeals to the United States Circuit Court of Appeals for the Ninth Circuit from the judgment of this Court entered on the 17th day of February, 1953, in favor of the defendant and against the said Chow Sing, plaintiff.

JACKSON & HERTOGS,
Attorneys for Plaintiff.

By /s/ JOSEPH S. HERTOGS.

[Endorsed]: Filed February 26, 1953.

In the District Court of the United States for the
Northern District of California, Southern Division

No. 30820

CHOW YIT QUONG,

Plaintiff,

vs.

HOWARD J. McGRATH, Etc.,

Defendant.

Before: Hon. Louis E. Goodman, Judge.

REPORTER'S TRANSCRIPT

Appearances:

For the Plaintiff:

JOSEPH S. HERTOGS, ESQ.

For Defendant:

ARLIN W. HARGREAVES, ESQ.

Monday, December 8, 1952, 10:00 A. M.

The Clerk: Chow Yit Quong vs. McGrath, court trial.

Mr. Hertogs: Ready your Honor.

The Clerk: Will respective counsel please state their appearances for the record?

Mr. Hertogs: Joseph S. Hertogs for the plaintiff.

Mr. Hargreaves: Arlin W. Hargreaves for the

defendant. I might state at this time, your Honor, this is the first time I have ever appeared as counsel. I am admitted to practice in this court and I have received authorization to appear on behalf of the Government.

The Court: You are not admitted?

Mr. Hargreaves: I am admitted.

The Court: I see.

Mr. Hertogs: There is no objection, your Honor.

The Court: All right.

Mr. Hertogs: If the Court please, I will keep the opening statement rather brief, because I know the Court is very familiar with these declaratory judgment suits filed under Section 503 of the Nationality Act of 1940.

This is a suit by the plaintiff, Chow Seng, by and through his guardian ad litem, Chow Yit Quong, seeking a declaratory judgment of United States citizenship. The citizenship of Chow Yit Quong, father of the plaintiff, is acknowledged and he [2*] has been previously admitted to the United States on numerous occasions as a citizen thereof. The sole question and issue before the Court is the question of whether the plaintiff, Chow Seng, is the lawful blood son of Chow Yit Quong, who is a recognized United States citizen, who resided in the United States prior to the birth of this plaintiff.

The father originally came to the United States prior to the birth of the plaintiff and made a trip to China, returned to the United States, his second trip to China—during the course of the second trip

*Page numbering appearing at top of page of original Reporter's Transcript of Record.

it is said that the plaintiff, Chow Seng, was born in Canton City, China. The plaintiff's birth was given to the Immigration and Naturalization Service upon the occasion of his examination at the time of his return from China in 1939. Shortly thereafter, in late 1939, Chow Yit Quong again made a trip to China at which time he obtained from the Immigration and Naturalization Service, prior to his departure, a returned citizen's form which we identify as form No. 430. At the time of securing this form, he also advised the Immigration and Naturalization Service that he had a child by the name of Chow Seng residing in China at that time.

Upon the occasion of his return from China in 1940, the same allegations were made. The father made a trip again to China in 1946 to bring this plaintiff to the United States and it was not until 1950 that he was successful in bringing him, and at that time the boy arrived at the port of San Francisco [3] and was excluded by the Immigration and Naturalization Service.

The decision of the local board of special inquiry was affirmed by the Commissioner and by the Board of Immigration Appeals on an appeal, and from that decision this suit was instituted.

At the trial of this action——

The Court: This is a suit, though, under 503, is it?

Mr. Hertogs: It is a suit under 503, your Honor. We intend to produce and introduce as evidence in behalf of this boy certain documentary proof showing the consistency of the father's claim over a long

period of years. We are going to have the father testify, the boy testify, the prior——

The Court: The what?

Mr. Hertogs: The prior landed son, who is a recognized citizen.

The Court: Oh, the prior landed son?

Mr. Hertogs: Prior landed son, yes, your Honor. And another witness, who saw the boy living with the boy in China during his last trip to China.

Mr. Hargreaves: Counsel has already set forth the statute under which this action is being brought. However, I would like to distinguish that this action is a little different than the ones that are naming defendant Acheson as a party. This one is naming McGranery and there has been a full and complete administrative hearing by a board of special inquiry which [4] found that the plaintiff was an alien and not a citizen of the United States. We wonder just exactly what does this mean, that they have found him to be an alien? If we bring it down to its substance, we find that he is attempting to enter the United States by fraud, and he is attempting to have this Court assist him to commit a felony. That is, as I say, if the finding of the board is correct. And I am sure your Honor is quite familiar with this type of case. I have been here in the courtroom many times when you have delved into them. In the past there has come up the question as to what proof is necessary. The burden of proof, of course, I believe, is conceded to be with the plaintiff, and we come up with the question what evidence must be presented to meet

this burden of proof. And considering the question, I believe we should take into consideration two presumptions.

In the past the courts have established a rule that a person coming from a foreign country speaking a foreign tongue, exhibiting their manners and traits,—that such a person is himself an exhibit. And it is presumed that he is an alien and not a citizen of the United States. I submit, your Honor, that this is not an empty or a weak presumption. It is something that must be met with and overcome by counsel for the plaintiff. This same presumption has been stated at various times by the Ninth Circuit Court of Appeals. In the past various counsel have alleged that this presumption only arose [5] due to the Chinese exclusion laws; however, when we come down and consider the cases, we find the presumption arose because of the person himself, his manners and traits, and not because the statute incorporated the same presumption in statute form.

Another presumption is created by a distinction which has seldom been referred to under the Constitution of the United States. There are only two types of citizens, those born in the United States and those who acquire citizenship through some form of naturalization. This principle has been recognized repeatedly by the courts, including the Supreme Court of the United States. I might refer your Honor to the case of *Elk vs. Wilkinson*, 112 US 94, and the case of *Wong Kim Ark*, 169 US 649. The principles are also set forth in the *Zimmer vs. Acheson*, 191 Fed. 2nd 209.

The plaintiff alleges birth in China and he must therefore have derived his citizenship, if at all, through some form of naturalization. Of course we consider this as a form called "derivative." But it is a grant from Congress and not something he derived by way of the Constitution. If he was coming before the Court and alleging a judicial naturalization, it would be incumbent upon him to produce the actual court record. The fact that he claims a form of naturalization through relationship does not lessen his burden to produce clear and convincing evidence of the facts upon which that naturalization could take place. In other words, your Honor, the plaintiff [6] must be considered an alien until he proves his form of naturalization.

Concluding this little opening statement, your Honor, I would like to mention that as a general rule, it is impossible for the Government to make any type of investigation in China, and the actual proof of fraud is beyond the scope of the Government in most of the cases. We can only hope, if this actually is fraud, or if there is actually fraud in such a case, to, in questioning the witnesses, break down their story. Now this has been done by the administrative procedure, they have found him to be an alien, and we will now submit the evidence to the Court.

Mr. Hertogs: At this time, your Honor, I would like to take exception to the opening statement of counsel for the defendant. In the first place, there is lot of reference in that concerning the administrative hearing and the presumption arising out of

the administrative hearing and the inferences had as to fraud in this particular case. Now I believe the Court is well aware of the recent decision of the Court of Appeals for the Ninth Circuit, the case of *Wong Wing Soo vs. McGrath*, 196 Fed. 2nd 120.

The Court: Well, you needn't labor that point. This is a proceeding *de novo*.

Mr. Hertogs: That's right, your Honor; it is not a question of review of an administrative procedure. In addition, [7] your Honor, I question the statement made by counsel concerning this boy being a naturalized United States citizen. He is not a naturalized citizen, he is a natural born United States citizen. That question has been determined by the Courts.

The reason I think it has, before the first act which provided by specific language for acquisition of citizenship of a foreign born child, in 1855, a foreign born child was recognized as a citizen of the United States under the common law rule of *jus sanguinis*.

The Court: I think that that perhaps was what Mr. Hargreaves really meant, that the only persons with whom the Constitution recognizes itself as citizens of the United States are those who were born here, and then they left it to Congress, the Constitution left it to Congress to determine what other persons could be citizens.

Mr. Hertogs: Yes, they are natural born; they are not naturalized citizens, your Honor, because Section 201 of the Nationality Act of 1940 is rather specific in that regard, because Section 201 has a

definition of citizens, and where it refers to a naturalized citizen, it states that a naturalized citizen is a person who acquires his United States citizenship at a time subsequent to birth.

Now the statute in effect specifically provide that if the relationship exists and if the father had prior residence in the United States, that that is a person who shall be a United [8] States citizen at the time of birth, and that "at birth" is in the statute itself.

The Court: Well, I think probably the distinction is that the persons who were recognized, who are declared constitutionally to be citizens of the United States, are those who are born here, and then by the Constitution Congress was empowered to make such laws in that regard as it may see fit, and Congress has passed certain statutes over the years which have determined who shall and who shall not be citizens and how they shall become citizens and how they shall lose their citizenship and so forth.

Mr. Hertogs: That's correct, your Honor.

As the first witness I would like to call Chow Yit Quong. [9]

The Court: Are there going to be interpreters?

Mr. Hertogs: Yes, I have Richard Fong, the official Superior Court interpreter, your Honor.

The Court: Has the new Attorney General been substituted in this action?

Mr. Hertogs: Yes, he has, your Honor.

(Whereupon Richard Fong was duly sworn to act as interpreter from the English language to the Chinese and vice versa in the above-entitled cause.)

The Clerk: Will you please state your name, sir?

The Interpreter: Fung—Richard Fong.

CHOW YIT QUONG

called on behalf of the Government, sworn through the interpreter.

The Interpreter: The answer is, "I do."

Mr. Hargreaves: If the Court please, I wonder if Chow Yit Quong is supposed to be in the United States 25 years,—I wonder if he couldn't speak English.

Mr. Hertogs: Well, your Honor, I might say this. He does understand and he can speak English; I believe we could probably get by with it, but I am told some of the discrepancies that arose during the original hearing were caused by using the English language at various times rather than using Chinese. I would prefer if possible to use an interpreter. [10] If the Court wants to try examination in English, that's agreeable with counsel.

The Court: Well, how long have you lived in the United States?

The Witness: United States——

Mr. Hertogs: Mr. Chow,——

The Court: That is an easy question.

Mr. Hertogs: ——try and talk in English to the Court, will you please?

(Testimony of Chow Yit Quong.)

The Court: That is easy question. How long you live in United States?

The Witness: In 1923 I come from China.

The Court: All right. And what is your business?

The Witness: Business, before working in shipyard.

The Court: What you do now?

The Witness: And in welding.

The Court: Are you a welder now?

The Witness: Yes.

The Court: Where you work?

The Witness: Before I work in Richmond No. 1 shipyard.

The Court: Where you work now?

The Witness: Now billing in Mark Hopkins Hotel, house work.

The Court: You do house work in Mark Hopkins Hotel? All right. And how old are you? [11]

The Witness: In '53—how old I am?

The Court: Where you lived?

The Witness: I lived in Montgomery Street, 30 Montgomery Street.

The Court: That is Montgomery Street?

The Witness: In 628, alone, before nineteen—

The Court: Who you live with?

The Witness: With—

The Court: You live alone or you live with somebody else?

The Witness: I don't understand.

Mr. Hertogs: Who lives with you?

(Testimony of Chow Yit Quong.)

The Witness: Who?

The Court: Who lives with you?

The Witness: Who—in house?

The Court: Yes, who lives with you in house?

The Witness: House—I no understand.

The Court: You married?

The Witness: Yes, I married.

The Court: Your wife here?

The Witness: No, wife in China.

The Court: Who lives with you, anybody, or you live alone?

The Witness: No, I live, at my son here.

The Court: You live with son?

The Witness: Yes, he my son. [12]

The Court: Anybody else? You live with anybody else besides your son?

The Witness: Is my son, is Chow Seng, is Chow Sam, he is here, he is my son, Chow Shom, Chow Shom he in other side.

The Court: Well on Montgomery Street where you live, you live on one room?

The Witness: Yes, one room, Montgomery Street, one room and my son in one room.

The Court: Your son lives same room with you?

The Witness: Yes, Chow Seng.

The Court: Mr. Interpreter, have you talked with this witness before?

The Interpreter: No.

The Court: Are you able to tell what dialect he speaks or what dialect are you going to interpret to him in?

(Testimony of Chow Yit Quong.)

The Interpreter: I presume in the Cantonese dialect.

The Court: Well, will you find out before we proceed what dialect you are going to speak with him in?

(Conversation between witness and interpreter not understood by reporter.)

The Interpreter: I can speak the Cantonese dialect.

The Court: And has he said enough so that you think that you can interpret in the Cantonese dialect?

The Interpreter: Yes, I am sure.

The Court: All right. [13]

The Clerk: Mr. Interpreter, will you please have the witness state his full name for the record?

A. (Through interpreter): Chow Yit Quong.

Mr. Hertogs: It is stipulated, your Honor, that Chow Yit Quong is a citizen of the United States.

Mr. Hargreaves: Yes.

The Court: Very well. How did he acquire his citizenship?

Mr. Hertogs: Through his father, your Honor; the father still lives in the United States, resides in——

The Court: The father was born in the United States?

Mr. Hertogs: Yes, I believe so.

(Answers given through interpreter except as otherwise indicated.)

(Testimony of Chow Yit Quong.)

Direct Examination

By Mr. Hertogs:

Q. Father born in United States?

A. Father born in United States, my father. (In English).

The Interpreter: "Yes, he was."

Mr. Hertogs: He lives in San Mateo, your Honor.

The Court: And where was the plaintiff—you were going to develop where he was born?

Mr. Hertogs: I wasn't, your Honor.

The Court: Let's get that for the record.

The Witness (In English): I born in China.

Q. (By Mr. Hertogs): And when did you first come to the [14] United States?

A. In 1923.

Q. Now subsequent to your arrival in the United States in 1923, when did you first make a trip to China?

A. I have forgotten the exact date.

Q. What year?

A. I think it was in 1926.

Q. And how long did you stay in China on that trip? A. Less than a year.

Q. And did you make another trip to China?

A. I have forgotten the date of the second trip.

Q. Approximately what year did you start?

A. No, I can't recall what year it was.

Mr. Hargreaves: If it will assist counsel, I will stipulate he departed in 1932.

(Testimony of Chow Yit Quong.)

Mr. Hertogs: I was going to ask counsel to stipulate, your Honor. I believe the record will disclose that, the official records will disclose that Chow Yit Quong first arrived and was admitted on June 30, 1923, at San Francisco; that he departed from San Francisco August 21, 1926, returned to San Francisco on March 6th, 1928; that he next departed from San Francisco on August 12, 1932, that he returned through the Port of San Francisco on March 11, 1939; that he next departed from San Francisco—pardon me, he returned at Los Angeles in 1939. That he next departed from the United [15] States from the Port of San Francisco November 17, 1939, returned through San Francisco on November 7, 1940; departed again on December 12, 1946, returned again on August 31, 1950. Is that correct?

Mr. Hargreaves: Correct.

Q. (By Mr. Hertogs): How many times have you been married? A. Twice.

Q. When were you married the first time?

A. The sixth year of the Chinese Republic.

Mr. Hertogs: That is 1917, your Honor.

Q. (By Mr. Hertogs): That was prior to your original admission to the United States?

A. Yes.

Q. And at the time of your admission to the United States in 1923, did you advise the Immigration and Naturalization Service that you were married at that time? A. Yes, I did.

Q. And what was the name of your wife?

(Testimony of Chow Yit Quong.)

A. Her name is Wong Suey Hong.

Q. And is Wong——

The Court: First wife?

Mr. Hertogs: That is the first wife.

Q. (By Mr. Hertogs): And is Wong Suey Hong still living? A. No, she died.

Q. And when did she die? [16]

A. She died in 1943.

Q. Now at the time of your departure for China in 1926, did you obtain a citizen's return certificate from the Immigration and Naturalization Service?

Mr. Hargreaves: I don't believe that is material, counsel. We have stipulated he was a citizen.

Mr. Hertogs: Yes, but I want to go into some other matters, your Honor, concerning the questions and answers that were asked and propounded by the Immigration and Naturalization Service at that time.

The Court: All right.

A. Yes, I did.

Q. (By Mr. Hertogs): And before you obtained this certificate from the Immigration and Naturalization Service, were you examined at great length concerning your family history?

A. Yes, they did.

Q. Now at the time of your return from China in 1929, did you fill and file a form with the Immigration and Naturalization Service indicating the members of your family then in China?

The Court: 1928, wasn't it? You said '29.

Mr. Hertogs: '28, was it?

(Testimony of Chow Yit Quong.)

The Court: You said '28 and now you said '29.

Mr. Hertogs: 1928.

Mr. Hargreaves: I believe I will object to that, your [17] Honor, on the ground that the witness can now testify as to the members of his family, and it would be a self-serving statement, prior statements, consistent statements, and the witness himself can testify as to what members of the family he has.

The Court: Generally speaking I think that objection is good, Mr. Hertogs. The proof does not lie in what he tells someone, the proof lies in his testimony as to the fact.

Mr. Hertogs: Yes, sir.

The Court: It would be time enough to meet that issue if it was sought to be shown that he made some inconsistent statement.

Mr. Hertogs: That is true, your Honor, but what we intend to show is the consistency over some 25 years of the claims of the various members of his family.

The Court: Well, wouldn't it be time enough to reach that if it were claimed that he had at some time or other made statements that were inconsistent or contrary as to the fact that he seeks to establish? In other words, I am not called upon to try here as a part of plaintiff's case what he said from time to time.

Mr. Hertogs: No.

The Court: But rather what the facts are that

(Testimony of Chow Yit Quong.)

involve the citizenship of his son. I think it would unduly prolong the direct examination. [18]

Mr. Hertogs: I will limit my questions at this time, then, your Honor. Withdraw that question.

Q. (By Mr. Hertogs): During the course of your trip to China between 1932 and 1939, did you have any children born in China?

A. Yes, I have.

Q. And what were the names of those children?

A. My oldest, eldest son is named Chow Bow.

Q. When was he born?

A. He was born the 17th year of the Chinese Republic.

Q. 17th year?

A. All I can remember is their names but not the dates of their births.

Q. What year was he born?

The Interpreter: He is referring to Chow Bow now.

A. Now I can tell you the exact date.

Q. How old is Chow Bow today?

A. I think he is 34 now.

Q. Was he born before you came to the United States? A. Yes.

Q. Now I am interested in those children that were born during your trips to China between 1932 and 1939.

A. My second son is named Chow Fat.

Q. How old is Chow Fat?

A. He was born a year later than Chow [19]
Bow.

(Testimony of Chow Yit Quong.)

Q. Well, was he born before you came to the United States? A. That's correct.

Q. Now I am not interested in those boys that were born before you came to the United States or during your first trip to China. I want only the names of your children that were born during your trip between 1932 and 1939.

A. My third son is named Chow Shom. (Chow Sam).

Q. When was he born?

A. Why I have forgotten the date of his birth.

Q. How old is he? A. He is 29 this year.

Q. And was he ever admitted to the United States?

A. Yes, he is here right now in the courtroom.

Q. He is in the courtroom today?

A. Yes (indicating), that's him.

Q. Which one? A. The one on my right.

Q. Sitting in the back of the room?

A. Chow Shom. (Chow Sam).

(Person stood in body of the courtroom.)

Q. (By Mr. Hertogs): Now who was your next child? A. Chow Hing.

Q. And how old is Chow Hing?

A. I know is over 20 years old, but I have forgotten how old he is. He was in the army and he is in Los Angeles now. [20]

Q. Who is your next child?

A. The next one is named Chow Wing.

Q. And when was he born?

(Testimony of Chow Yit Quong.)

A. Now I have forgotten the date of his birth.

Q. How old is Chow Wing.

A. He is 25 this year.

Q. That is 25, Chinese reckoning?

A. Chinese reckoning.

Q. And who is your next son?

A. That is Chow Seng, the one who is sitting in here today?

Q. Is he in the courtroom now?

A. Yes, that's him. (Indicating.)

Q. Sitting in the front of the courtroom. Now where was he born?

A. He was born August the 23rd, 1934.

Q. Where was he born?

A. In Canton City, China.

Q. Were you there at the time of his birth?

A. Yes, I was in China.

Q. And were you present at the time of his birth? A. Yes, I was present.

Q. And how long did you stay in China subsequent to his birth? A. About seven years.

Q. Now who was your next child?

A. Her name is Chow Suey, a daughter. [21]

Q. And when was she born?

A. A year after his birth.

Q. Now you have testified that you were married twice. When were you married the second time?

A. I married a second time January 11, 1951.

Q. In what year?

(Testimony of Chow Yit Quong.)

A. No, I was wrong on the first statement. I was married January 11, 1947.

Q. Where were you married?

A. In Canton City.

Q. And what was the name of your second wife?

A. Her name is Yee So Han.

Q. And where does she reside now?

A. In Canton City.

Q. You made the last trip to China, then, from December, 1946, to August, 1950, is that correct?

The Court: You already read from the record that it said he was in China from 1946 to 1950.

Mr. Hertogs: Yes, your Honor.

The Court: Is that right?

Mr. Hertogs: That is correct. I want him—because he made the mistake of saying '51, your Honor, once. It couldn't be.

A. That's correct.

Q. (By Mr. Hertogs): During your residence in China from [22] early 1947 to 1950, did you live with Chow Seng?

A. Yes, that's right, up to the present time.

The Court: Well, no, the question was whether or not you lived in China with the boy Chow Seng between 1947 and 1950.

Mr. Hertogs: That's correct.

The Court: That was the question. Are you having any difficulty with the witness as to dialect?

The Interpreter: No, the dialect.

The Court: Or is it his own mental ability that you have difficulty with in answering?

(Testimony of Chow Yit Quong.)

The Interpreter: Yes, it is mental ability. He is not giving me a direct answer, so I have to explain the question to him.

The Court: It is not a question of inability to understand one another in the dialect; it is his manner of answering?

The Interpreter: Yes, that's correct.

The Court: All right.

Mr. Hertogs: At this time, your Honor——

The Court: What is his manner of answering the questions?

The Interpreter: He is giving me an answer in a different form.

The Court: That do not conform?

The Interpreter: No, in a different form, not directly. [23]

The Court: You mean that in his answers he talks about something else?

The Interpreter: Something else, and then lead back to the answer.

The Court: Is that generally true? Have you had that difficulty right along now or only in some questions?

The Interpreter: In some questions.

The Court: All right, go ahead.

Mr. Hertogs: At this time, your Honor, I would like to have this picture of five individuals marked at Plaintiff's No. 1 for identification.

The Clerk: Plaintiff's Exhibit 1 marked for identification.

(Testimony of Chow Yit Quong.)

(Whereupon photograph referred to above was marked Plaintiff's Exhibit No. 1 for identification only.)

Q. (By Mr. Hertogs): I will show you Plaintiff's Exhibit No. 1 for identification and ask you if you have seen this photograph before?

A. Yes, I have seen it.

Q. Now when did you see it before?

A. That picture was taken while I was in China.

Q. Are you in this picture?

A. Yes, that's me.

Q. Did you have this picture taken?

A. Yes, I did. [24]

Mr. Hargreaves: Will you specify what trip that was, counsel?

Q. (By Mr. Hertogs): When did you have this picture taken?

A. It was taken in January of 1947, I think.

Q. January of 1947?

A. Yes, around there.

Q. Where were you living in January——

A. (Interrupting): No, it was taken in 1950.

Mr. Hertogs: Call the Court's attention that this has a date right on it.

Q. (By Mr. Hertogs): Will you please identify the persons who appear in that picture?

A. This is me.

Q. Which way are you reading?

The Interpreter: From right to left.

A. (Continuing): The next one is my son, Chow

(Testimony of Chow Yit Quong.)

Seng. The next one is a daughter of my friend, and I consider her my god-daughter. The next one is my wife.

The Court: That is the second wife?

A. (Continuing): And the small child is another son of mine.

Q. (By Mr. Hertogs): Now is that the first or second wife? A. My second wife.

Q. And is that woman the mother of the small child that appears in the picture?

A. Yes. [25]

Q. Now where was this picture taken?

A. In Canton City, China.

Q. Now why did you have this picture taken?

A. Well, I was about to leave for the United States, so I had the picture taken for remembrance.

Q. Who put the date on the bottom of the picture? A. I did. I wrote it down.

Mr. Hertogs: I ask it be admitted, your Honor.

The Court: It may be admitted.

The Clerk: Plaintiff's Exhibit 1 admitted into evidence.

(Whereupon Plaintiff's Exhibit No. 1 for identification only was received in evidence.)

Mr. Hertogs: I have a picture of two small persons I would like to have marked as Plaintiff's Exhibit next in order, your Honor, for identification. I have shown all these exhibits to counsel previously, your Honor.

(Testimony of Chow Yit Quong.)

The Clerk: Plaintiff's Exhibit 2 marked for identification.

(Whereupon photograph referred to above was marked Plaintiff's Exhibit No. 2 for identification only.)

Q. (By Mr. Hertogs): Ask you if you have seen this picture before, which is marked Plaintiff's Exhibit No. 2 for identification?

A. Yes, I have seen it.

Q. Who are they? [26]

Mr. Hargreaves: I will object, your Honor; the photograph is of a very small boy and a very small girl, and I don't believe there has been a proper foundation to show that he knows who those persons are.

The Court: Well, he is asking him who they are.

Mr. Hargreaves: I mean, my objection was, there hasn't been any foundation to show that he had any knowledge of who these people are.

Mr. Hertogs: Well, he can identify them.

The Court: That is what he is asking him.

Mr. Hertogs: I am asking if he can identify them.

A. Yes, I know them.

Q. (By Mr. Hertogs): Who are they?

A. The boy is my son and the girl is my daughter.

Q. What is the name of your son?

A. The son's name is Chow Seng.

Q. And who is the daughter?

(Testimony of Chow Yit Quong.)

A. The daughter's name is Chow Suey.

Q. How can you recognize them?

A. Well, they are my children, I ought to know.

Q. Now did you have this photograph in your possession?

A. Well, yes, I had this in my possession when I came back the last trip.

Q. Do you know when that photograph was taken?

A. It was taken in 1938. [27]

Q. In what year?

A. 1938.

Q. How old is the boy in that picture?

The Interpreter: You mean at the time of taking the picture?

Mr. Hertogs: Yes.

A. He was very small then.

Q. (By Mr. Hertogs): Were you in China at the time this picture was taken?

A. I had already returned to the United States.

Q. From which trip?

A. After my return on the second trip.

Q. What trip do you mean by "second trip"?

A. I have forgotten the dates.

Q. You have testified Chow Seng was born in 1934?

A. Yes.

Q. Now you also testified that you came back from one trip to China in 1939?

A. Well, I don't think I can remember the dates.

Q. The records show that you made another trip to China in 1939 and returned in 1940; do you understand?

A. Yes.

(Testimony of Chow Yit Quong.)

Q. Now from the time Chow Seng was born in 1934 to the time that you returned to the United States in the early part of 1939, did he live with you in China? [28]

A. Yes, I was living with him during all that time.

Q. You lived together? A. Yes.

Q. And who else lived with you at that time?

A. Well, my other sons were living with me then, Chow Bow and Chow Fat.

Q. Was Chow Sam and Chow Hing also living with you at that time?

A. Yes, they were there also.

Q. Now did you all live together in the same house? A. Yes.

Q. Did you have your meals together?

A. Yes.

Q. And everybody slept in the same house, is that correct? A. Yes, the same house.

Q. Now you have testified that your first wife was Wong Suey Hong, is that correct?

A. Yes.

Q. Was Wong Suey Hong the mother of Chow Seng? A. Yes.

Q. Did you and Wong Suey Hong treat Chow Seng as your son? A. Yes.

Q. Now who gave birth to Chow Seng?

A. Wong Suey Hong.

Q. And where was that? [29]

The Court: Where was the birth?

A. Canton City.

(Testimony of Chow Yit Quong.)

Q. (By Mr. Hertogs): And you were present at that time? A. Yes, I was.

Q. And had you and Wong Suey Hong been living together prior to that time as man and wife?

A. Yes.

Q. Now subsequent to that time you made another trip to China between 1939 and 1940, is that correct? A. Yes.

Q. Was Chow Seng living with you at that time? A. Yes.

Q. Did he live in the same house with you?

A. Yes.

Q. And he ate his meals with you?

A. Yes.

Q. And did the boy that you saw in China during this 1939 to 1940 trip look like the boy that you last saw in China when you left and returned to the United States in 1939?

A. Yes, it was the same person.

Q. When was the next time that you saw Chow Seng?

A. Well, the next trip when I went to China.

Q. Now when you went to China at that time and saw Chow Seng, did he look like the same boy that you saw when you left China and returned to the United States in 1940? [30] A. Yes.

Q. Is Chow Seng your lawful blood son?

A. Yes.

Q. Have you always claimed to have a son named Chow Seng? A. Yes.

Q. Now is this person who is now present in

(Testimony of Chow Yit Quong.)

court the same Chow Seng that you have consistently claimed throughout the years?

A. Yes.

Mr. Hertogs: I will ask that the 1942 income tax statement here be marked as Plaintiff's exhibit next in order, your Honor.

The Clerk: Plaintiff's Exhibit 3 marked for identification.

The Court: 1940 Income Tax Statement?

Mr. Hertogs: 1942, and 1943 as Plaintiff's next in order, your Honor, and then 1944 and 1945. The next one, certified copy to Selective Service questionnaire——

The Clerk: Plaintiff's Exhibits 4, 5, 6 and 7 marked for identification.

Mr. Hertogs: 3, 4, 5, 6 and 7.

(Whereupon documents identified above were thereupon marked Plaintiff's Exhibits 3, 4, 5, 6 and 7 for identification only.)

Q. (By Mr. Hertogs): I will show you Plaintiff's Exhibit No. [31] 3 for identification and ask you if you recognize this document.

A. Well, it is my income tax return.

Q. Did you file that income tax return with the Bureau of Internal Revenue in San Francisco for the year 1942?

A. Yes, I did.

Q. I will show you Plaintiff's Exhibit No. 4 for identification and ask you if you recognize that document.

A. This is also my income tax return.

(Testimony of Chow Yit Quong.)

Q. And did you file that with the Bureau of Internal Revenue for the fiscal year 1943?

A. Yes, I did.

Q. I will show you Plaintiff's Exhibit No. 5 for identification and ask you if you recognize that document.

A. This is also my income tax return.

Q. And did you file that with the Bureau of Internal Revenue at San Francisco for the fiscal year 1944?

A. Yes, I did.

Q. I will show you Plaintiff's Exhibit No. 6 for identification and ask you if you recognize that document?

A. This is also my income tax return.

Q. And did you file that with the Bureau of Internal Revenue at San Francisco for the fiscal year 1945?

A. Yes, I did.

Q. Now did you register for Selective Service in 1942? [32]

A. Yes, I did.

Q. I will show you Plaintiff's Exhibit No. 7 for identification and ask you if you recognize this document. I call your attention specifically to the signature at the bottom of page 7.

A. Yes, that is my signature.

Q. And did you file this Selective Service questionnaire with the Selective Service system in January of 1943?

A. Yes, I did.

Mr. Hertogs: I will ask these be introduced in evidence.

Mr. Hargreaves: May I ask counsel the purpose they are being introduced for?

(Testimony of Chow Yit Quong.)

Mr. Hertogs: To show the consistent claim of the son Chow Seng, your Honor.

Mr. Hargreaves: May I make the same objection as to the prior statement of the witness? He has a self-interest, and he claimed allotments for his children on the income tax, and also to show consistency with the immigration records, and it is an attempt to corroborate the witness' present testimony, and the documents are self-serving.

The Court: Well, the documents are self-serving, there is no doubt about that. It doesn't prove that that is the son, but let them be marked. The objection really is to the weight rather than——

Mr. Hertogs: That is correct, your Honor, it is a [33] question as to the weight rather than to the admissibility; and it is a little bit out of order of proof.

The Court: Let them be marked.

The Clerk: Plaintiff's Exhibits 3, 4, 5, 6, and 7 admitted into evidence.

(Whereupon Plaintiff's Exhibits 3, 4, 5, 6, and 7 for identification only were received in evidence.)

Mr. Hertogs: At this time, your Honor, I would like to make a request for the Government to produce the blood examinations that were conducted in this particular case in accordance with the Court's order.

Mr. Hargreaves: Counsel was furnished a copy.

(Testimony of Chow Yit Quong.)

Mr. Hertogs: I do not happen to have them. I don't know what I did with them.

Mr. Hargreaves: I will stipulate they are compatible.

The Court: The blood examinations of the witness and of the alleged son?

Mr. Hertogs: Yes, your Honor.

The Court: What do they show?

Mr. Hargreaves: Paternity was possible, your Honor.

The Court: They show the same blood—they show that the—what do they call it?

Mr. Hertogs: Compatibility. You have different groupings, your Honor.

The Court: The same group, or compatible—?

Mr. Hertogs: Compatible blood groupings, yes, your Honor. As long as the Government will stipulate to it—

The Court: Why encumber the record with it, then, if there is a stipulation on it?

Mr. Hertogs: We will not.

The Court: What do the examinations show, Mr. Hargreaves?

Mr. Hargreaves: If the Court please, the examination showed that paternity was possible under the blood grouping.

The Court: There were compatible blood groupings.

Mr. Hargreaves: That's right. Of course we only had just the witness. We didn't have the mother—so that the test is actually very limited.

(Testimony of Chow Yit Quong.)

The Court: It shows, though, as between father and alleged son, there was a compatible blood grouping?

Mr. Hargreaves: That's correct.

Mr. Hertogs: That is right, your Honor.

Q. (By Mr. Hertogs): Mr. Chow, you have identified this boy sitting in the first row as your son, Chow Seng, is that correct? A. Yes.

Q. Is this boy that is sitting in this courtroom the same person that was born to your wife in Canton City in 1934? A. Yes, that is correct.

Q. And how do you know that?

A. Oh, that is my own son. I ought to [35] know.

Q. Well, did you see him enough during the intervening years to clearly recognize him as your son? A. That is correct.

Mr. Hertogs: I have no further questions, your Honor.

The Court: Well, we will take a five-minute recess now.

(Recess.)

Cross-Examination

By Mr. Hargreaves:

Q. Mr. Chow, on Mr. Quong now—Chow Yit Quong, is that correct?

A. Yes, that is correct.

Q. Now is the family name——

The Interpreter: Chow is the family name.

(Testimony of Chow Yit Quong.)

Q. (By Mr. Hargreaves): You have previously testified here that you were in China from 1934 until 1939; is that correct? A. Yes.

Q. You also testified you were in China from November, 1939, until December, 1940, is that correct? A. Yes, that's correct.

Q. Where were you living in China during those years?

A. Between the years 1934 and 1939 I was living in Canton City for a while and then we moved back to the village.

Q. Did you also reside part of the time in Macao? A. Yes.

Q. During all those years in which you resided in Canton City and Macao, in which there was an American Consul, did [36] you ever register the birth of the plaintiff? A. No, I did not.

Q. Why didn't you?

A. Well, when I was in Macao I didn't know there was an American Consulate there.

Q. Did you know there was an American Consul in Canton City?

A. Yes, I know there was a consulate there, but I didn't register with him.

Q. Isn't it a fact that you went to the consul in Macao in order to clear to come to the United States in 1940? A. Yes.

Q. Then you did know there was a consul in Macao?

A. No, I didn't went to the Macao American

(Testimony of Chow Yit Quong.)

Consulate. It was the Hong Kong Consulate and I went to get clearance.

Q. Where did you clear your other sons which you brought to the United States?

A. With the Hong Kong Consulate.

Q. Did you at that time register the birth of the plaintiff?

A. When he asked me how many sons I have, I did mention that I had a son by the name of Chow Seng.

Q. Did he——

The Court: That was not the question that he asked. He asked him whether he registered.

(Reinterpreted.)

A. Well, he asked me and I told him. [37]

Q. (By Mr. Hargreaves): Did you fill out a form? A. He didn't give me any paper.

Q. How many sons do you have?

A. Nine sons.

Q. How many daughters do you have?

A. One daughter.

Q. Is she alive? A. She died.

Q. Then your only children living are nine sons, is that correct? A. Yes, nine.

Q. Out of those nine sons can you give the birthdate of one other than the plaintiff?

The Interpreter: I am afraid I didn't understand.

Q. (By Mr. Hargreaves): Can you give the birthdate of any of your sons other than the plain-

(Testimony of Chow Yit Quong.)

tiff? A. I can remember the youngest one.

Q. What is it?

A. The youngest one is Chow Ting. He was born August 31, 1948, in Hong Kong.

Q. Is that year 1948 correct?

(Document produced by witness.)

Mr. Hargreaves: I will have to ask the witness to testify from memory.

Mr. Hargreaves: Is the year 1948 correct? [38]

The Court: Tell him not to look at the paper.

(Interpreted to witness.)

A. Well, I think it was August 31, 1950.

Q. (By Mr. Hargreaves): You are not sure, is that correct? A. I think it was about then.

Q. Who accompanied——

The Court: You are having some difficulty in——

The Interpreter: No, he is not. I understand him perfectly, but he is not giving me a direct answer.

The Court: For instance, when you asked him the question as to what was the date the youngest son was born, what sort of an answer did he give you?

The Interpreter: Well, at first he told me it was 1948 and afterwards he tells me it is 1950.

The Court: Well, when you asked him if he could remember the date of birth of any of his children except Chow Seng, what sort of an answer did he give you?

(Testimony of Chow Yit Quong.)

The Interpreter: He said he couldn't remember anyone except the youngest.

The Court: All right.

Q. (By Mr. Hargreaves): Who accompanied you to the United States in 1940?

A. Well, I was accompanied by Chow Sam and Chow Hing.

Q. Were they excluded from admission to the United States by a Board of Special Inquiry? [39]

Mr. Hertogs: I object to the question, your Honor. The record will show that they were admitted.

Mr. Hargreaves: The record will also show that they were first excluded and admitted on appeal. The purpose of the question is to show, if your Honor please, consistency in bringing sons to the United States—whether or not these other sons are citizens or not; and I believe it is a proper determination for the Courts to consider that evidence at the same time.

The Court: Well, it is a record fact, is it?

Mr. Hargreaves: It is a record fact that they were excluded by a Board of Special Inquiry.

The Court: Well, you don't need to ask him that, then. I will accept any statement either side wants to make so far as any record facts are concerned. If he will state what the record is, I think that will be sufficient, if you consider it material.

Mr. Hargreaves: If the Court please, the record indicates that Chow Hing and Chow Sam arrived in the United States December 29, 1940, ex-

(Testimony of Chow Yit Quong.)

cluded by a Board of Special Inquiry on April the 7th, '41; the case was reopened, re-excluded on August the 26th, '41, and it was appealed and the appeal was sustained in October, '41.

The Court: October of '41 they were admitted?

Mr. Hargreaves: They were finally admitted, yes. [40] I have the file here, if the Court wishes.

The Court: Well, that is not necessary. You are satisfied to accept that statement as to the facts?

Mr. Hertogs: Yes, as long as the record shows, your Honor, that the Appeal Board found that the decision of the Board of Special Inquiry was improper and admitted them as citizens.

The Court: Well, obviously they must have reversed them or else they wouldn't have been admitted.

Q. (By Mr. Hargreaves): You have stated that you were married for the second time on January, 1947, is that correct? A. Yes, in 1947.

Q. Where did that marriage take place?

A. In Canton City.

Q. Was the plaintiff present at the time of your marriage? A. No, he was not present.

Q. Was he present at the wedding feast which occurred after your marriage?

A. Well, during the wedding feast in Canton City, my son was not present; but when we had the feast in the village, he was then present.

Q. When was the first time the plaintiff saw your second wife? A. In the village.

The Court: When, when? [41]

(Testimony of Chow Yit Quong.)

A. (Continuing): I think it was in 1947, in January 17th or 18th.

Q. (By Mr. Hargreaves): In the village?

A. In the village.

The Court: Is that after the marriage?

The Witness: Yes, after the marriage.

Q. (By Mr. Hargreaves): I would like to refer to interrogatory—it was propounded to the plaintiff, interrogatory number four, in which he admitted that he testified that he was actually present at the wedding feast in Canton City. Do you have an comments to make on his testimony?

Mr. Hertogs: I object, your Honor. Interrogatories are not admissible in evidence. They may be admissible for purposes of cross-examination or impeachment, but they are not admissible in evidence.

Mr. Hargreaves: I will offer this, the interrogatories, into evidence for the purpose of impeachment.

The Court: The answers, you mean?

Mr. Hertogs: Interrogatories, your Honor, do not go to this witness. They go down to the plaintiff, Chow Seng.

Mr. Hargreaves: I am only trying to attempt to give this witness an opportunity to explain the testimony, if he can, of the plaintiff, when it is inconsistent with his own.

The Court: You mean the answer to the interrogatories, the plaintiff testified that he was present at the feast? [42]

(Testimony of Chow Yit Quong.)

Mr. Hargreaves: That's right. The plaintiff has testified before the immigration——

The Court: Admits he was present, it says.

Mr. Hargreaves: He says he was present in Canton City at the time of the marriage and he did attend the feast.

The Court: Well, of course now, what interrogatory do you want to propound to the witness?

Mr. Hargreaves: Well, I just wanted to give the witness an opportunity to explain the testimony of the plaintiff, if he could. It is inconsistent. That is, they can't be reconciled. The plaintiff says he was in Canton City at the feast, the witness says he was in the village.

The Court: Well, you have a contrary statement, then?

Mr. Hargreaves: That's right, your Honor.

The Court: Well, what good is it going to do to have the witness explain it?

Mr. Hargreaves: Well, I just want to find out if there is any logical explanation which he can give.

The Court: Well——

Mr. Hargreaves: Apparently——

The Court: ——just call his attention to the fact that his son so testified in answer to an interrogatory and ask him if he has any explanation of that.

Q. (By Mr. Hargreaves): In answer to Interrogatory No. 4, your son has stated that he testified before the Immigration [43] Service that

(Testimony of Chow Yit Quong.)

he was in Canton City at the time of your marriage and that he did attend the wedding feast which was held in Canton City. Do you have any comments to that statement?

A. Well, I believe my son misunderstood. I had two wedding feasts, one in Canton City and the other one in the village. My son was not present at the Canton City feast, but after six or seven days I accompanied my second wife to the village and had another wedding feast, and it was there that he was present.

Q. You are positive of that?

A. Yes, I am positive.

Q. Do you have any brothers or sisters?

A. Yes, I have.

Q. Please name them.

A. I have a brother named Chow Sang Quong. He is older than I am. That's all.

Q. You don't have any sisters, then, is that right?

A. No.

Q. Does your brother have any children?

A. Yes, he has.

Q. How many and what sex? Just the number.

A. He has six sons. Correction. Four sons and a daughter.

Q. Were any of those children residing in Kwantung, Po Village, at the time you were there on your recent trip to China?

A. Two of his sons were in the Kwantung, Po Village at the [44] time I was in China.

(Testimony of Chow Yit Quong.)

Q. Has the plaintiff ever been in Kwantung, Po Village? A. Yes, he has lived there.

Q. How much time has he spent in Kwantung, Po Village? A. About two weeks.

Q. When? A. In December of 1946.

Q. How large is Kwantung, Po Village?

A. At the present there are only three houses.

Q. And the plaintiff spent approximately two weeks in the village in 1946, is that correct?

A. Yes.

Q. At that time were the children of your brother residing in this three-house village?

A. Yes, two of his sons were living in Kwantung, Po Village then.

The Court: Is your brother an American citizen?

The Witness: Yes, he is.

Mr. Hertogs: He lives in San Mateo, also, your Honor.

Q. (By Mr. Hargreaves): I direct your attention to the answer of plaintiff to Interrogatory No. 10, in which he states in answer to the question of what family does your brother have, "I now that he has a wife and some children, but I don't know how many children.

"Q. Have you ever seen any of Chow Sang Quong's children?" [45]

He answered, "No."

Do you have any explanation for that statement if he was actually in the village?

A. Well, at the time my son arrived in Kwan-

(Testimony of Chow Yit Quong.)

tung, Po Village, my brother's two sons weren't there then.

Q. You have just previously testified that they were there.

A. Well, they were there when I had the wedding feast.

Q. Were they invited to the feast?

A. Yes, I did.

Q. Was the plaintiff at the feast?

A. Yes, he was.

Q. Do you know why he should also state that he does not know the names of any of those children?

A. Well, he never seen them, so he wouldn't know their names.

Q. You have just testified he was at the feast together with them.

A. Well, there was so many people there and I didn't introduce them to him.

Q. How many people were at the feast?

A. About 15 or 16 people.

Q. Were there any other relatives there?

A. Yes, some relatives of my former wife, that is, my deceased wife.

Q. But these were the only two persons who were actually your relatives, is that correct? [46]

A. Yes, from my family.

Q. You have stated that your first wife passed away in 1943, is that correct?

A. Yes, in 1943.

Q. Where did her death occur, that is, in what

(Testimony of Chow Yit Quong.)

place? A. At the Kwantung, Po Village.

Q. What was the cause of her death?

A. Well, it was some kind of a sickness.

The Court: What kind of a sickness?

The Witness: Well, it was a contagious disease.

The Court: What kind of a contagious disease?

The Interpreter: He couldn't say. It is a contagious disease, that's all.

The Court: Were you there at the time of her death?

The Witness: No, I was in the United States then.

The Court: All right.

Mr. Hargreaves: How did you learn of your wife's death?

A. Well, I received a letter from my son.

Q. Which son?

A. The oldest son, Chow Bow.

Q. Did he tell you in that letter that your wife had died in the village? A. Yes.

Q. When and where did your daughter die?

A. My daughter died three days previous to my wife's death. [47]

Q. Was that also in the village?

A. Yes.

Q. Where are your wife and daughter buried?

A. Well, my daughter was buried right opposite my village. It is called Saw Dei.

Q. And the mother?

A. My wife is buried in Lei Jee-un.

Q. Is that near the village? A. Yes.

(Testimony of Chow Yit Quong.)

Q. Did you visit their graves when you were in the village on your last trip?

A. Yes, I did.

Q. Has your wife's body ever been removed and reburied?

A. Yes, the graves were opened and the bones taken out and then reburied in the same place.

Q. Still near the village; is that correct?

A. The same place.

Q. That was the original burial ground?

A. Yes, the original burial ground.

Q. I direct your attention to the plaintiff's answer to Interrogatory No. 11, in which he states that his mother and his sister both died in Macao. Do you have any explanation?

A. Well, he was very young then. I think he don't remember.

The Court: Well, how old was he at the time?

The Witness: I think he was about eight years old then. [48]

Mr. Hargreaves: The record will reveal, your Honor, that he was claiming birth in '34; the death occurred in 1943.

Mr. Hertogs: About eight and a half years old, your Honor. The death was in March and the birth was in August.

Q. (By Mr. Hargreaves): In Interrogatory No. 11, the plaintiff has also stated that his mother was buried in Macao and that his sister was buried there.

(Testimony of Chow Yit Quong.)

A. Well, all right, then say that he was very small and couldn't remember the events.

Q. He also testified that on your last trip to China you moved your wife's body from Macao to the home village and that you told him so.

A. Well, he just misunderstood me. What he meant was that I reopened the grave and then took the bones out and then rebury it again in the village.

The Court: Why did he do that?

Mr. Hertogs: That is a custom, your Honor—Chinese custom. They do it all the time.

The Interpreter: That is the Chinese custom in our village.

The Court: All right.

Q. (By Mr. Hargreaves): The plaintiff has also testified that his sister is still buried in Macao.

A. No, she was buried in the same day in the village.

Q. Has the petitioner ever resided in Quei Hing? [49]

The Court: He means did he ever live in Quei Hing.

Mr. Hargreaves: That is Quei Hing City.

The Court: Quei Hing City.

The Interpreter: You mean Quei Yung?

Mr. Hargreaves: Yes, that's right.

A. Yes, two nights.

Q. (By Mr. Hargreaves): I am speaking of the plaintiff, Chow Seng.

A. Yes, he did.

Q. Did he only stay there two nights?

(Testimony of Chow Yit Quong.)

A. I mean, I was there for two nights.

Q. How long did Chow Seng live in Quei Yung City?

A. I think two or three years.

Q. When you were in Quei Yung for those two nights, where did you stay?

A. I was living at a place called Fat Yun Low.

Q. Is that the same place where Chow Seng was living?

A. Yes.

Q. How many stories were in that building?

A. It is a house with a little mezzanine floor.

Q. You previously testified that there were four rooms in the loft. Was that correct?

A. Yes, I did.

Q. How many of your sons were living there?

The Interpreter: You mean in the house or in the loft? [50]

Q. (By Mr. Hargreaves): The house.

A. Five sons together.

Q. Was there more than one building?

A. It is only one building.

Q. You previously testified that that was made of brick with wooden lofts, that there was a store below the lofts. Is that correct?

A. Well, the ground floor was a store.

Q. Was there a stairway to the loft?

A. Yes.

Q. Now I direct your attention to the Interrogatory No. 12 of the plaintiff, in which he describes the living quarters in Quei Yung City as consisting of three separate buildings, each of only one story. Do you have comment?

(Testimony of Chow Yit Quong.)

A. Well, there was three buildings but connected together.

Q. Was there actually a two-story building, as you have testified?

Mr. Hertogs: I object, your Honor. He hasn't stated there was a two-story building. He said there was a ground floor and a mezzanine.

Mr. Hargreaves: All right, we will change the question.

Q. (By Mr. Hargreaves): Was there actually a building with a mezzanine or loft?

A. Yes.

Q. The plaintiff states that there were no lofts, that the [51] first building was used as a kitchen and a dining room, the second and third buildings were used as bedrooms. This does not conform to your testimony as to the one building with lofts.

A. Well, I think my son was mistaken.

Q. He also testified in answer to the question, "Was there a stairway of any kind in any of those buildings"?

"A. There was only one bamboo stepladder which was used to hang things up on nails on the wall."

You have testified there was a stairway. Do you have any comment?

A. Well, yes. My answer is there is not exactly a stairway, but the ladder, the bamboo ladder.

Q. Then your answer of stairway was not correct, is that right?

(Testimony of Chow Yit Quong.)

A. Well, we call it a stairway and to say—and in fact it is a moving stairway, made of bamboo.

Q. Where did you sleep, that is, in what room while you were there the two days?

A. As you go in there's four rooms and I was in the rear room.

Q. In the which?

The Interpreter: Rear.

Q. (By Mr. Hargreaves): The plaintiff has described the sleeping arrangements as that you slept in the first building, [52] that he and two of his brothers slept in the middle building. Do you have any comment?

A. Well, I know that the first room was occupied by my oldest son and then the second room was occupied by Chow Bow, my second son, the third room was occupied by my son, Chow Seng, and the rear room was occupied by me and also Chow Wing.

Q. Do you still claim that there were not three buildings but all these rooms were actually in the loft in one building?

A. Yes, there's four rooms in the loft.

The Court: You have some more questions, I take it, Mr. Hargreaves?

Mr. Hargreaves: Yes.

The Court: Perhaps we might take the recess at this time. I will not be able to hold session after three o'clock today, because of some matters that have to be attended to. But we will meet at 1:30 and then run until three o'clock. I assume we won't be able to finish this case today?

Mr. Hargreaves: I don't believe so, your Honor.
The Court: Well, we will reconvene at 1:30.

(Whereupon an adjournment was taken until
1:30 o'clock this day.) [53]

Monday, December 8, 1952—1:30 P.M.

CHOW YIT QUONG

resumed the stand and having been previously
sworn, testified further as follows:

Cross-Examination
(Continued)

By Mr. Hargreaves:

Q. Mr. Chow, just before lunch you testified
that you and Chow Seng were in the home village
for approximately two weeks in the first part of
1947, is that correct?

A. He stayed in the home village two weeks, but
I only stayed there one week.

Q. You were together with Chow Seng in the
village for one week, is that correct?

A. He went to the home village one week prior
to my return.

The Court: He still hasn't the question.

The Interpreter: That is the way he answered.

The Court: Well, try him again.

The Interpreter: I am trying to get exactly
what he said.

The Court: Ask him again if he was there one
week at the same time as Chow Seng.

(Reinterpreted.)

(Testimony of Chow Yit Quong.)

A. Yes, we lived together for a week.

Q. (By Mr. Hargreaves): During that time what were the [54] sleeping arrangements in your home in Kwantung, Po Village?

A. We were not living in one house. He lives in the old house and I lived in the one next to it.

Q. Do you mean that you slept in one house and he slept in another house? A. Yes.

Q. I direct your attention to Interrogatory No. 9, in which the plaintiff has stated that during the time that you were in the village with him, that you, your wife—your second wife, that is—and the plaintiff all slept together in one house.

A. No, that isn't true, and my wife lived in one house and he lived in another.

Q. You previously stated that the village consisted of three houses, is that right?

A. Yes, there were three houses.

Q. Do you recall testifying before the Board of Special Inquiry at the Immigration and Naturalization Service at the time Chow Seng entered the United States? A. Yes, I was there.

Q. Do you recall testifying at that time that there were four houses in the village?

A. Well, at that time I meant to say there were three houses and one temple or ancestral hall.

Q. Has there ever been more than three houses in the village? [55]

The Interpreter: Does that include the ancestral hall?

(Testimony of Chow Yit Quong.)

Mr. Hargreaves: No, just the houses, excluding the ancestral hall.

A. There were only three houses.

Q. That is all there has ever been?

A. Used to be eight houses.

Q. What happened to the other five houses?

A. They were all torn down.

The Court: All what?

The Interpreter: Torn down.

Q. (By Mr. Hargreaves): So the time that you and the plaintiff were in the village, there were only three houses, is that correct?

A. Yes, that's correct.

Q. Did the petitioner or the plaintiff ever reside in the village at any time other than that two-week period? A. No.

Q. Did he reside in the village for approximately eight months after your wife's death?

A. I was in the United States then. I think he lived there for a period.

Q. You believe then that he resided in the home village for approximately eight months, in approximately 1943 or 1944, is that right?

A. Yes. [56]

Mr. Hargreaves: I have no further questions, your Honor.

Redirect Examination

By Mr. Hertogs:

Q. Counsel for defendant asked you previously if you registered the birth of this plaintiff with the

(Testimony of Chow Yit Quong.)

American Consul General at Hong Kong, Canton or Macao. Now did you register the birth of any of your other children at the American Consulates in China? A. No.

Q. You previously testified that at the feast which was held subsequent to your marriage to the second wife, that the two children of your brother were the only relatives present. Now wasn't the wife of your second brother or the wife of one of her sons present also at that feast?

The Interpreter: I didn't get the question.

(Record read.)

Mr. Hargreaves: I believe, your Honor, he stated that his own relatives, his blood relatives he is referring to.

A. Well, at the feast, besides my brother's two sons, there was the wife of my brother's elder son.

Q. The wife of your brother's eldest son?

A. Yes.

Q. Where was she living?

A. She was living in my old house.

Q. In the old house? A. Yes. [57]

Q. Is that the same house where Chow Seng was living? A. That is correct.

Q. Now you testified that you were living in the new house, which is next door. Now did you eat your meals in the new house or did you eat your meals in the old house?

A. Yes, we went to Chow Seng's house for our meals.

(Testimony of Chow Yit Quong.)

Q. You actually had your meals, then, in the same house as Chow Seng, the same house Chow Seng had his meals? A. Yes.

Q. Did you normally stay in that house or the house next door, except for sleeping at night?

A. Well, I normally moved from one house to another, but when we have the meals I usually go to Chow Seng's house.

Q. Now you have stated that you were informed that your wife died in Kwangtung, Po Village. When did you receive such notification?

A. It was when the Japanese surrendered. That was the time I received notice that my wife died.

Q. Now you previously testified that your family was living in Macao and you have likewise testified that your wife died in Kwantung, Po Village, in 1943. Now when did the family move back to Kwantung, Po Village?

A. Well, I don't quite remember the exact date, but it was after the Japanese occupation of Hong Kong that we moved back to the village. [58]

Q. You weren't there at that time, is that correct? A. I was in the United States.

Q. Had they been back in the village long before the death of your wife?

A. After we moved back to the village and about six months afterwards that was when my wife died.

Q. Now you previously testified that the Kwantung, Po Village, has three houses, now standing. Are there any ruins of the other five houses still remaining?

(Testimony of Chow Yit Quong.)

A. Well, there was some old walls there remaining.

Q. Old walls left. Is that all? A. Yes.

Q. Now once again, I show you Plaintiff's Exhibit No. 2 for identification and ask you if you know where that picture was taken.

A. It was taken in Macao.

Q. Do you know when it was taken?

A. It was the year when his mother died.

Q. The same year the mother died?

A. After this picture was taken, we moved to the village.

Q. Now you previously stated that the picture was taken in 1938. Now you state it was taken just before the family moved to Kwantung, Po Village. Now which of those answers is correct?

A. Well, immediately after the taking of this picture we [59] moved back to the village.

Q. Was Chow Seng smaller than this on the last trip you made to China before World War II—smaller than the size indicated by that picture?

The Interpreter: That is when the trip—the trip he made after World War II?

Q. (By Mr. Hertogs): Was Chow Seng smaller than this at the time of his return to the United States just prior to World War II?

The Interpreter: I still can't get that.

Mr. Hertogs: He returned, see, to the United States in 1940. How large was Chow Seng in physical stature at that time?

A. I don't think the picture was taken in 1940.

(Testimony of Chow Yit Quong.)

The Court: No, what he wants to know is this. Was Chow Seng bigger or smaller than he appears in that picture in 1940 when he came back to the United States?

A. Well, in 1940 he was older than this picture.

Q. (By Mr. Hertogs): He was older than this picture?

A. M-hm.

Q. How could he be older in 1940 and this picture have been taken subsequent to your return to the United States and just before your family moved back to Kwantung, Po Village?

A. Well, in other words, I meant to say that this picture was taken after my return to the United States. [60]

Q. Were you in China or the United States when this picture was taken?

A. I had already returned to the United States.

Q. Now how did this picture come into your possession?

A. Well, I got it when I returned the last time to China and brought my son over.

Mr. Hertogs: I will ask the picture showing six individuals be marked as plaintiff's exhibit next in order, and if there is no objection on the part of counsel, your Honor, I would rather substitute a copy of it, because it belongs to someone else.

Mr. Hargreaves: That's all right.

The Clerk: Plaintiff's Exhibit 8 marked for identification.

(Whereupon photograph referred to above was marked Plaintiff's Exhibit No. 8 for identification only.)

(Testimony of Chow Yit Quong.)

Q. (By Mr. Hertogs): I show you Plaintiff's Exhibit No. 8 for identification and ask you if you have seen this picture before?

A. Yes, I have seen it.

Q. And are you in that picture? A. Yes.

Q. And when and where was that picture taken?

A. It was taken in 1947 in Canton City.

Q. Will you tell us who the people are from right to left? [61]

A. The first one is me, the second one is Chow Seng, the third one is So Tak, the fourth one is So Tak's wife, the fifth one is my second wife, the sixth and last one is my god-daughter.

Q. Now is this person, So Tak, that you refer to here, present in the courtroom at this time?

A. Yes, he is here.

Q. And is he sitting in the rear of the courtroom? A. Yes.

Q. Now what was the occasion of this picture?

A. That is the wedding picture of So Tak.

Q. Now I notice in this picture that Chow Seng appears to be small for his age at that time. Was he always small for his age?

A. He has always been very small.

Q. You previously testified that your wife and daughter died of certain contagious diseases in China. Do you know whether or not Chow Seng had that contagious disease? A. No.

Mr. Hertogs: I have no further questions, your Honor.

(Testimony of Chow Yit Quong.)

The Court: Anything else?

Mr. Hargreaves: Yes, your Honor.

Recross-Examination

By Mr. Hargreaves:

Q. You previously stated you recall testifying before the Board of Special Inquiry in San Francisco [62] at the Immigration Service, is that correct? A. Yes.

Q. I now show you page 15 of that Board record and ask you if that is your signature.

A. Yes, that is my signature.

Q. On page 10 of this record there is a question, "Describe briefly the Kwantung, Po Village, as it was when you last saw it." Your answer, "There were only four houses. That is, four dwelling houses, when I last saw the village, in January, 1947. There are two houses and a house back of each of them. There was also a temple called Quan Dai."

You have just now testified that there were only three houses. Which testimony is correct?

The Interpreter: The questions are pretty long. Could I ask him——

Mr. Hargreaves: Do you want to read it?

The Interpreter: Ask him answer by answer?

Mr. Hargreaves: Here (indicating).

The Interpreter: I have explained the question.

Q. (By Mr. Hargreaves): Which is correct, his present testimony or this he gave before the Board?

(Testimony of Chow Yit Quong.)

A. What I meant is three dwelling houses and a temple. That's four all together.

Q. At that time you stated there was a house, there were two houses and a house back of each of them and a temple to [63] the north of the village. That testimony was not correct, then, is that right?

The Interpreter: He has even got me confused.

The Court: Well, that is the vice of asking those questions. All a cross-examiner should do is present a contrary statement and ask for explanations—you get arguments.

Mr. Hargreaves: All right. I will withdraw the question, your Honor.

I would like to have the certified copy of the Board record marked for identification.

The Clerk: Defendant's Exhibit A marked for identification.

(Whereupon document identified above was marked Defendant's Exhibit A for identification only.)

Mr. Hargreaves: Forget the question.

The Court: Anything else of the witness? Mr. Interpreter, how old were you when you came to the United States in 1923?

A. I was 25 years old then.

The Court: So you are now how old?

A. 53 years.

Q. Between 1923 and the present time, you spent about half your time in China, is that right?

(Testimony of Chow Yit Quong.)

A. Well, I am not clear on that. I am here and there.

Q. Well, he ought to know. You tell him I think he ought [64] to be able to answer that. I say that for the 28 years since 1923, about half that time he spent in China, is that right?

A. I think I spent more time here than in China.

The Court: Well, the record shows about 14 years in China, is that right, between 1923 and the present time?

Mr. Hertogs: Well, not——

The Court: Well, almost 14, the way I figure it, more or less.

The Court: Well, the next question is this. What did you do during those years that you were in China? What did you do?

A. Well, my family is there, so I just go back and visit them.

Q. Did you do any work or engage in any business during the years that you spent in China since 1923? A. No, I did not.

Q. The only time you worked from 1923 was when you were living in the United States?

A. That's correct.

Q. And what was your first, what did you do the first two or three years by way of work after you came to the United States in 1923?

A. I was working in a Chinese restaurant.

Q. All right. What work did you do in China before you left there in 1923? [65]

(Testimony of Chow Yit Quong.)

A. I was farming in China.

Q. Now from 1923 to the present, up to the present time, where do you consider your home, in the United States or in China?

A. I consider the United States my home.

Q. Well, if you consider the United States as your home, why did you spend so many years in China after 1923?

A. Well, most of my family is in China, so I have to go home and go back and visit them until they are all here.

Q. Now I understand that from 1946 to 1950 you lived in China, is that right? A. Yes.

The Court: Mr. Interpreter, how old are you?

The Interpreter: I will be 50 next week.

The Court: Were you born in the United States?

The Interpreter: Yes.

The Court: So you went to school here in the United States?

The Interpreter: Yes, but I have been to China for about six years.

The Court: Any other questions, counsel?

Mr. Hertogs: No, your Honor.

The Court: That's all.

Mr. Hertogs: Your Honor, at this time I would like to call the Court's attention, and ask the Court to take judicial [66] notice of the fact that it was impossible for this man to bring his wife to the United States from the time of his entry in 1923 up to——

The Court: I wasn't intending to make any

point of that. Any questions I asked were directed to the general picture of the situation that I think is applicable to many of these cases, that's all. I realize that what you say is correct.

(Witness excused.)

Mr. Hertogs: At this time, your Honor, normally I would call the plaintiff as a witness next in order, but I have an out-of-town witness who has a business in Susanville, and I would prefer to call him out of turn.

The Court: Very well.

Mr. Hertogs: So Tak.

The Clerk: Does this witness understand English?

Mr. Hertogs: Well—just in case——

So Tak, do you understand enough English?

(So Tak nodded in the affirmative.)

SO TAK

called on behalf of the plaintiff, sworn.

The Clerk: Please be seated. Will you tell the Judge your name? A. My——

The Court: What is your name? [67]

A. My name is So Tak.

The Clerk: How do you spell that?

A. S-o T-a-k.

The Court: Tak?

The Witness: Yes.

The Court: So Tak?

The Witness: Yes.

The Court: Is that right?

(Testimony of So Tak.)

Mr. Hertogs: Yes, your Honor.

(Answers given in English except as otherwise indicated.)

Direct Examination

By Mr. Hertogs:

Q. And where do you live, So Tak?

A. I live Susanville.

Q. And are you a United States citizen?

A. Yes.

Q. And how did you acquire your United States citizenship? A. 1955 I take the citizenship.

Q. 1945? A. 1945.

Q. 1945? A. Yes.

Q. You were naturalized while you were in the Army, is that correct? A. Yes.

Q. Do you have any proof of United States citizenship with you? [68] A. Yes.

Q. May I see it, please.

A. Citizenship — I — paper here. Citizenship paper. (Producing document.)

Q. Citizenship papers there. But you have something, haven't you?

(Witness stood, addressed a remark in Chinese to a man seated in the body of the courtroom, an overcoat was transported by the said man to the courtroom barrier, a document was produced therefrom and transmitted to counsel via the interpreter.)

(Testimony of So Tak.)

A. I am citizen, I have passport.

Q. (By Mr. Hertogs): You have a passport?

A. Yes.

Q. United States Passport No. 2667, issued in San Francisco to So Tak, S-o T-a-k, 115 Waverly Place, San Francisco, on May 7, 1947.

Is that your picture? A. Yes.

Q. On page 4 of this document. And you were naturalized while you were in the Army, is that correct? A. Yes, m-hm.

Q. Do you know a man named Chow Yit Quong?

A. Yes, and——

Q. And when did you first meet Chow Yit Quong? [69]

A. 1936

Q. 1936? A. Yes.

Q. Where did you meet him in 1936?

A. Hong Kong.

Q. In Hong Kong? A. M-hm.

Q. And how long did you know him at that time?

A. Oh, before, I know three, four days.

Q. Three or four days? A. M-hm.

Q. When did you first see Chow Yit Quong?

A. On this time he come, I get army, I come San Francisco, I know him, I know him.

Q. You met him here again in San Francisco?

A. Yes.

Q. And when was that?

A. Waverly, you know, 115, I know him.

Q. 115 Waverly Place? A. M-hm.

(Testimony of So Tak.)

Q. Now, what year was this?

A. I come 1946, San Francisco.

Q. 1946? A. M-hm.

Q. Now, did you make a trip to China subsequent to that time? [70] A. Yes.

Q. And when did you make this trip to China?

A. 1947.

The Court: 1947?

Q. (By Mr. Hertogs): May I see that passport again, please?

A. Yes (producing).

(Conversation between Messrs. Hargreaves and Hertogs out of hearing of the reporter.)

Mr. Hertogs: This passport indicates you returned to the United States on September 8, 1947, and were admitted by the Immigration and Naturalization Service at that time. Is that the correct date of your return?

A. Yes, I come back then.

Q. Now, how long had you been in China on that trip? A. Two months, 18 days.

Q. What was the purpose of that trip to China?

A. How long is——

Q. Why did you go to China?

A. May or June.

Q. You went in May or June, but why?

A. Oh, I go to China to get married.

The Court: What was the answer?

Mr. Hertogs: To get married.

Q. (By Mr. Hertogs): I show you——

(Testimony of So Tak.)

A. I went to China to get married. [71]

Q. You went to China to get married?

A. Yes.

The Court: What is the matter with the Chinese girls in the United States? Why don't some of the Chinese boys and men here marry the Chinese girls that are in the United States?

The Witness: Oh, I don't know, I go to China and marry.

The Court: I know you did that, but I say, why did you go to China to get married?

The Witness: I like it better China.

The Court: Why do you like it better? What's the matter with these girls?

The Witness: Oh, here—I don't know. You know, I don't know much English, you know me. I no English.

The Court: Well, you mean that the Chinese girls of Chinese ancestry in this country speak better English than you? Is that what you mean?

The Witness: I not much English. He—don't know with me.

The Court: I never thought—I was going to say that I never thought language was a barrier to that sort of thing.

The Witness: I like in China. I don't like him here.

The Court: I asked that question because this is one of the things that I commented on in the other case, and that I have observed in so many of the cases, that there is a pattern that is followed—

(Testimony of So Tak.)

here the American citizens of Chinese [72] ancestry; everyone of them has to go back to China to find a gal to marry.

Mr. Hertogs: That is true, your Honor.

The Court: Well, it is true, but there is a definite significance to that in connection with these cases.

Mr. Hertogs: I don't think—I think the Court is stressing that point too much. I think you would find——

The Court: I don't know what the meaning of it is, Mr. Hertogs. I just say that it is a matter of some significance. I don't know how to evaluate it. I am not pretending to.

Mr. Hertogs: It is a question of where the number of boys and the number of girls married here, usually the American born are inter-marrying, whereas those who are born in China go back to China and marry. There has been a pattern for—even all these veterans that were naturalized during World War II and even a number of our American born veterans of World War II all returned and married Chinese girls who were born in China.

Q. (By Mr. Hertogs): I will show you Plaintiff's Exhibit No. 8 for identification and ask you if you have seen this picture before?

A. Yes.

Q. And when did you see that picture?

A. The place, Canton.

Q. Canton City? [73] A. Yes.

Q. When was that picture taken?

(Testimony of So Tak.)

A. Oh, take this picture I marry Leon Tung Company.

Q. Leon Tung Company picture?

A. M-hm.

The Court: That is when you got married?

The Witness: Yes.

The Court: That is your——

The Witness: I marry.

The Court: Where's your wife now?

The Witness: Susanville.

The Court: Where?

The Witness: Susanville.

The Court: Oh, she is over here? You live here?

The Witness: I work Susanville.

The Court: I see.

The Witness: I live—I leave her in Susanville.

The Court: She came in as a war bride?

Mr. Hertogs: Yes, your Honor.

The Court: Is that right?

Mr. Hertogs: Yes, she returned.

Q. (By Mr. Hertogs): Will you identify these people from right to left?

A. Oh, Chow Yit Quong——

Q. Who is the next? [74]

A. Chow Seng.

Q. Chow Seng? A. This is me.

Q. That is yourself? A. My wife.

Q. Your wife?

A. He is Suey Hong, his wife.

Q. Whose wife? A. Chow Yit Quong.

Q. Chow Yit Quong's wife?

(Testimony of So Tak.)

A. A God-sister.

Q. God-sister? A. God-children.

Q. And this was taken right after your marriage, is that correct? A. Yes.

Mr. Hertogs: Ask that it be introduced in evidence, your Honor.

The Clerk: Plaintiff's Exhibit 8 admitted into evidence.

(Whereupon Plaintiff's Exhibit 8 for identification only was recieved in evidence.)

Q. (By Mr. Hertogs): Now, while you were in China on this trip, did you meet a boy identified as Chow Seng? A. M-hm.

Q. That is the same boy whose picture appeared in that picture? [75] A. Yes, same boy.

Q. And where did you meet him?

A. Oh, I marry, you know—I don't know, not much here—I know Chow Yit Quong, Chow Seng.

The Court: Did you get that?

The Reporter: Not all of it.

Mr. Hertogs: Would you like to use the interpreter?

The Court: Well, take it slower. Maybe we can get it.

Q. (By Mr. Hertogs): How did you meet Chow Seng at that time?

A. Oh, he — father, you know — Chow Seng father.

Q. Yes.

(Testimony of So Tak.)

A. I know him, I told his boy come up see me, I take some pictures.

Q. You told him to come and see you and take some pictures? A. Yes.

Q. You knew Chow Yit Quong here in the United States? A. M-hm.

Q. And did you know Chow Yit Quong was in China? A. Yes.

Q. How did you know that he was in China?

A. Oh, I go back to China, go back Hong Kong.

Q. Yes?

A. You know, I find Chow Yit Quong.

Q. You find—And where did you find Chow Yit Quong? [76] A. I go Je-ung Wing Company.

Q. Je-ung Wing Company? A. M-hm.

Q. And what did they tell—

A. They told me Chow Yit Quong leave Canton, China.

Q. Lived in Canton, China?

A. Canton, China.

Q. Where did you see Chow Yit Quong in China?

A. I go, finally he go over to Canton, China, you know—I go, he, I see.

Q. You went to see him, went to his home to see him, is that right? A. Yes.

Q. When was that? A. Right after—

Q. It was after you returned, right after you returned to China? A. Yes.

Q. Was that before or after your marriage?

A. Oh, after married, I go, before—I go China,

(Testimony of So Tak.)

I see him, I see Canton, you know, live hotel.

Q. You lived in a hotel? A. Yes.

Q. Where? A. Canton. [77]

Q. Where were you married in Canton or Hong Kong? A. Married Canton.

Q. Married in Canton. Now, you saw Chow Yit Quong in Canton, is that right? A. Yes.

Q. And did you see Chow Seng? A. Yes.

Q. In Canton? A. Yes.

Q. Now, the Chow Seng you saw in Canton, is he the same boy that is here in the courtroom today?

A. Yes, yes.

Q. Same boy? A. Same boy.

Q. Now, how did you meet Chow Seng in China?

A. Oh, I go, I know Chow Yit Quong. I see Chow Seng, he boy.

Q. You knew—now let me see if I have this right. You knew Chow Yit Quong and he introduced you to Chow Seng as his boy? A. Yes.

Q. Chow Seng is his boy?

A. He told me his boy.

Mr. Hargreaves: I object, your Honor, on the grounds it is hearsay as to what Chow Yit Quong told him. [78]

The Court: Well, it doesn't add anything very much to the testimony of the father except that it's in a sense corroborative.

Mr. Hertogs: It is corroborative evidence, your Honor. I am going to develop a little farther and see how much more he knew about this.

(Testimony of So Tak.)

The Court: Well, it is a little difficult to get the answers. We had better have the interpreter.

(Following answers given through interpreter except as otherwise noted.)

Q. (By Mr. Hertogs): Explain to us how you first met Chow Seng.

A. I went to his house, that is, Chow Yit Quong's house, and Chow Yit Quong introduced me to Chow Seng as his son.

Q. Where was Chow Yit Quong and Chow Seng living at that time?

A. They were living at Ting Yung How Street, No. 6, in the Tung San District.

The Court: Where's that town?

A. In Canton, China.

Q. (By Mr. Hertogs): Did you visit Chow Yit Quong's home? A. Yes.

Q. Now, was Chow Seng living in that house at the same time? A. Yes, they were

Q. Were you introduced to Chow Seng at the time that you [79] first appeared at that house?

A. Yes.

Q. And Chow Seng was there at that time?

A. Yes, he was there.

Q. Was Chow Seng also living in that house?

A. Yes.

Q. Now, did Chow Yit Quong tell you that Chow Seng was his son?

Mr. Hargreaves: Objection; hearsay.

The Court: Well, he has already answered it.

Mr. Hertogs: I was trying to clarify it. I

(Testimony of So Tak.)

wasn't sure it was in the record, before, your Honor.

The Court: Well, he has already answered it.

Mr. Hertogs: All right, I will withdraw that question.

Q. (By Mr. Hertogs): Were Chow Yit Quong and Chow Seng living together at that time as father and son? A. Yes.

Q. Now, did you see Chow Yit Quong and Chow Seng together at any other time in Canton?

A. I go to his house for meals quite frequently.

Q. Did Chow Yit Quong and Chow Seng also attend your wedding?

A. They were there but they were kind of late.

Q. Well, did they attend the feast given after your wedding? A. Yes, they were present.

Mr. Hertogs: I have no further questions, your Honor. [80]

Cross-Examination

By Mr. Hargreaves:

Q. When did you first enter the United States?

A. 1942.

Q. How did you enter, what status?

A. As a crew member.

Q. How were you able to remain on shore if you were a crew member?

A. Well, I volunteered to enter the United States Army.

Q. How long had you been on shore before you volunteered in the Army? A. Five days.

(Testimony of So Tak.)

Q. Do you mean that only five days after your arrival the Army would accept you as a member?

A. Yes.

Q. Did they ask you if you were a citizen of the United States?

A. Well, they did ask me that question and I answered that I was not a United States citizen.

Q. Did you tell them that you had only been in the United States for five days?

A. Yes, I did tell them.

Q. You stated that you saw Chow Yit Quong in Hong Kong in 1936. Did you see any of his children at that time?

A. No, I didn't know his children then.

Q. Have you seen any other children of Chow Yit Quong's [81] other than Chow Seng?

A. No.

Q. You stated that you were in China for about two months and 18 days. How were you able to arrange a marriage on that short a time.

A. Well, I had to get back to the United States immediately.

Q. That is not an answer to the question. How did he arrange his marriage in two month's time?

A. Well, as a veteran I can get married immediately after my registration.

Q. Did you make any arrangements for your marriage?

The Court: What he is trying to find out is how he did such a quick job of getting a gal and getting married. How does he answer that?

(Testimony of So Tak.)

A. Well, I like the girl, so we just get married and I return to the United States.

Q. (By Mr. Hargreaves): Did you make any arrangements before you went to China for the girl?

A. I had my mind set on getting married when I go to China, so I just did it.

Q. Did you send any money over to her parents?

A. No.

Q. Did you give her parents any money at the time after your arrival? A. No. [82]

Q. How did you meet her?

A. She was introduced to me by Chow Yit Quong's wife.

Q. How long did you know her before you got married? A. Ten days.

Q. Actually, didn't you purchase your wife in China?

Mr. Hertogs: Object to the question, your Honor, as irrelevant and immaterial, improper question on cross-examination.

Mr. Hargreaves: Believe it goes to the credibility of the witness.

The Court: Well, it is a little bit far fetched as to credibility.

Mr. Hargreaves: It is a common practice in China, your Honor; most of the wives are purchased.

The Court: That might have some bearing on all these cases, among a great many other factors, but I don't see that it is particularly pertinent as a matter of cross-examination.

(Testimony of So Tak.)

Mr. Hargreaves: I will withdraw the question.

The Court: It may well be that they did or didn't. As far as this witness is concerned, I don't see its materiality.

Mr. Hargreaves: I will withdraw the question.

Q. (By Mr. Hargreaves): How much time did you actually spend in the home of Chow [83] Yit Quong?

A. I went to Canton City on July the 17th and got married on July the 27th. Then I returned to Hong Kong on the 29th.

Q. Then you were in Canton City approximately ten days, is that right? A. 12 days altogether.

Q. And you visited Chow Yit Quong's home occasionally during that 12 day period?

A. Ever day I see him.

Q. Now, during that time didn't Chow Yit Quong intend to bring Chow Seng to the United States?

A. No, he didn't tell me anything about it.

Q. Did you desert your ship when you came into the United States. A. Yes.

Mr. Hargreaves: No further questions.

Mr. Hertogs: No further questions, your Honor.

The Court: That's all.

(Witness excused.)

Mr. Hertogs: The Government doesn't want this witness present any longer, do they?

Mr. Hargreaves: No.

Mr. Hertogs: He may go home.

Mr. Hargreaves: Yes.

Mr. Hertogs: Next witness will be Chow Seng, your Honor.

The Clerk: He doesn't understand [84] English?

Mr. Hertogs: No.

CHOW SENG

called on behalf of the plaintiff, sworn.

(Answers given through interpreter.)

The Clerk: Please have him take the witness stand. Will you please have the witness state his full name to the Court.

A. Chow Seng.

Direct Examination

By Mr. Hertogs:

Q. Where do you live?

A. 628 Montgomery Street, San Francisco.

Q. And who do you live with at that address?

A. With my father.

Q. Who else lives with you?

A. That's all.

Q. How long have you lived together?

A. Since I was released from the Immigration Service, at the present time.

Q. Do you have the same sleeping accommodations?

The Court: What do you mean, do they sleep in the same room?

Mr. Hertogs: Same room, your Honor.

A. Yes, we sleep in the same room.

(Testimony of Chow Seng.)

Q. (By Mr. Hertogs): Do you have your meals together? [85] A. Yes.

Q. Now, who did you live with immediately prior to coming to the United States?

The Interpreter: He is not responsive.

(Reinterpreted.)

A. I was living with my father.

Mr. Hertogs: Who else was living with you at that time?

A. I was living with my father in Canton City.

Q. Yes, who else was living with you in Canton City besides your father?

A. My father's second wife.

Q. Anyone else? A. My god-sister.

Q. Did your father have any children by his second wife? A. Yes.

Q. How many?

A. When I came to the United States he had one.

Q. Has one been born since that date?

Mr. Hargreaves: Can't hear you, counsel.

Mr. Hertogs: One born subsequent to that date.

A. Yes.

The Court: A boy, too?

The Interpreter: Boy.

The Court: What becomes of all the girls in China? How do they get this big population when in all the cases I have [86] seen here, all boys are involved? All boys—no girls.

Mr. Hertogs: Well, your Honor, I might state

(Testimony of Chow Seng.)

that I expected that question, so I made a little search the other day and I find that slightly more than 30 per cent of these cases that I have filed involve girls.

The Court: Well, that's more than I would have thought.

Mr. Hertogs: That is what I expected. That is the reason I looked it up. I have slightly more than 30 per cent of them who are girls, your Honor.

Mr. Hargreaves: Does counsel know what per cent the actual number of girls or boys in the cases is?

Mr. Hertogs: I presume it is the same as it is here.

The Court: Well, my point was that in these cases I have seen, that is, particular cases filed, the children are practically all boys. I know there have been some cases that do involve girls, but I mean, the family—they are practically all boys.

Q. (By Mr. Hertogs): I will show you Plaintiff's Exhibit No. 1 and ask you if you have seen this picture before. A. Yes, I have seen it.

Q. And where did you see that picture before?

A. Before I came to the United States.

Q. Are you in that picture?

A. Yes, I am in it.

Q. And who are the other persons in that picture, identifying them from right to left? [87]

A. The one on my right is my father. The second one is me. The third one is my god-sister. The

(Testimony of Chow Seng.)

fourth one is my step-mother. The child is my little brother.

Q. And when and where was this picture taken?

A. I can't recall the date.

Q. Was it taken shortly before your departure from China en route to the United States?

A. Yes.

The Court: Is that the 1947 picture?

Mr. Hertogs: No, that is the 1950 picture, your Honor.

The Court: Oh, 1950.

Q. (By Mr. Hertogs): Now, I will show you Plaintiff's Exhibit No. 8 and ask if you have seen this picture before. A. Yes.

Q. And does your picture appear in there?

A. Yes.

Q. And can you identify the other individuals from right to left?

A. The first one on my right is my father. The second one is me. The third one is So Tak, the fourth one is the wife of So Tak. The fifth one is my step-mother. The sixth and last one is my god-sister.

Q. Do you know when and where this picture was taken?

A. It was taken on the date of So Tak's marriage.

Q. And where was it taken? [88]

A. It was taken in the photographer's

Q. In what city? A. In Canton City.

Q. I will show you Plaintiff's Exhibit No. 2 for

(Testimony of Chow Seng.)

identification and ask you if you have seen this picture before? A. Yes, I have seen it.

Q. And is your picture in there? A. Yes.

Q. And who is the other person?

A. She is my sister.

Q. And where is she now?

A. She is dead now.

Q. Do you know when and where this picture was taken? A. No, I can't recall.

Mr. Hertogs: I ask this picture be introduced in evidence, Your Honor.

The Court: All right.

The Clerk: Plaintiff's Exhibit 2 admitted and filed in evidence.

(Whereupon Plaintiff's Exhibit 2 for identification only was received in evidence.)

Q. (By Mr. Hertogs): Now, you stated you lived with your father, Chow Yit Quong, in China before you came to the United States. Now, how long did you live with him in China before you came to the United States? [89]

A. I can't tell you offhand. I can't recall how many years. It began the first year that my father went to China.

Q. Do you remember what year that was?

A. In 1947.

Q. Now, you state he went to China in 1947; you came to the United States in 1950. Did you live together with him from 1947 to 1950? A. Yes.

(Testimony of Chow Seng.)

Q. Did you live together in the same house?

A. Yes.

Q. Did you have your meals together?

A. Yes.

Q. Did you consider Chow Yit Quong to be your father? A. Yes.

Q. And did Chow Yit Quong consider you to be his son?

Mr. Hargreaves: Objection; asking for his opinion.

The Court: Well, did he consider him to be his son; the question is objectionable in that form. Sustained.

Q. (By Mr. Hertogs): Did Chow Yit Quong treat you as his son? A. Yes.

Q. Did Chow Yit Quong identify you to other individuals as his son?

Mr. Hargreaves: Objection. I believe Chow Yit Quong would be the one to testify as to that.

The Court: No, overruled. I suppose he means introduced [90] him, when you say "identified him."

Mr. Hertogs: Yes.

A. Yes.

Q. (By Mr. Hertogs): Did you introduce Chow Yit Quong to your friends as your father?

A. Yes.

Q. Did you and Chow Yit Quong speak to one another as father and son? A. Yes.

Q. Do you have a brother by the name of Chow Sam? A. Yes.

Q. And where is Chow Sam now?

(Testimony of Chow Seng.)

A. He is in this courtroom.

Q. And when did Chow Sam come to the United States? A. I can't remember the date.

Q. Do you remember approximately what year?

A. I don't know whether it is 1940 or 1941.

Q. Was it some date prior to World War II?

A. That I don't know.

Q. Do you actually remember much of what took place prior to the termination of World War II?

Mr. Hargreaves: What does that mean by the "termination of World War II"?

The Court: You mean prior to 1945?

Mr. Hertogs: Prior to 1945, your [91] Honor.

The Court: Well, he was about 11 years old.

Mr. Hertogs: That is the reason.

The Court: He could remember something.

A. I don't remember clearly the events prior to that.

Q. (By Mr. Hertogs): What has been your physical condition during your residence in China?

A. Well, I am sick most of the time.

Mr. Hertogs: At this time, your Honor, this being a relationship question, I would like to ask Chow Yit Quong to step up here because of the similarity of appearance of these two individuals, which I would like to call to the Court's attention at this time.

The Court: I don't get what you——

Mr. Hertogs: I would like to have Mr. Chow Yit Quong step up here and stand next to the plaintiff, because of the similarity of physical appear-

(Testimony of Chow Seng.)

ance. I would like to call it to the Court's attention.

Mr. Hargreaves: I will object to that, your Honor. That is not proof of relationship.

The Court: Well, I have observed them both. I don't know how you are going to make that a record fact in any way.

Mr. Hertogs: I am not so much interested in making it a record fact as pointing it out to the Court at this time, because of the very, very similar facial characteristics of these two individuals. [92]

The Court: Do you just want him to come up and stand here?

Mr. Hertogs: Yes.

The Court: All right.

Mr. Hertogs: Will you come up here, Mr. Chow?

(Whereupon Chow Yit Quong arose and came forward, facing Court, standing next to the witness.)

Mr. Hertogs: I think, if the Court will look, there are very, very similar markings on this father and son. The forehead and nose and the eyes and lips and chin and everything else are practically identical.

Mr. Hargreaves: Will you turn them around, counsel?

(Chow Yit Quong and witness turned around in place.)

The Court: Well, I am not an expert in this field, so I can't draw much from that.

(Testimony of Chow Seng.)

Mr. Hertogs: I have no further questions, your Honor.

Mr. Hargreaves: I will probably take quite a little time, your Honor.

The Court: Well, supposing we go ahead until three o'clock and then we will take a recess until tomorrow morning.

Mr. Hargreaves: All right.

Cross-Examination

By Mr. Hargreaves:

Q. Now I show you Exhibit No. 8 which you have previously identified. That was taken in 1947, is that correct? [93] A. Yes.

Q. I show you Exhibit No. 1. Do you recognize this picture? A. Yes.

Q. Was that taken in 1950?

A. That I don't know. I am not clear on the date.

Q. Isn't it a fact that both of these photographs were taken after arrangements had been commenced for you to come to the United States?

A. That I don't know.

Q. When did you first contact the American Consul? A. No, I don't recall the date.

The Court: "I don't" what?

The Interpreter: "I don't recall the date."

Q. (By Mr. Hargreaves): Was it before or after you attended this wedding?

(Testimony of Chow Seng.)

A. Well, this picture was taken prior to my contact with the American Consulate.

Q. Where did you first contact the American Consul, in Canton City?

A. At the Hong Kong Consulate.

Q. Was that before you went to Canton City from Quei Yung City?

A. That was when I was living in Canton City.

Mr. Hargreaves: Ask this be marked for identification.

The Clerk: Defendant's Exhibit B marked for identification. [94]

(Whereupon document referred to below was marked Defendant's Exhibit B for identification only.)

Mr. Hertogs: May I see it?

(Conversation between Messrs. Hargreaves and Hertogs out of hearing of the reporter.)

Q. (By Mr. Hargreaves): I now show you Defendant's Exhibit B, which has been marked for identification, and direct your attention to an affidavit which appears together with a photograph, and ask you if this is your photograph?

A. Yes, that is me.

Q. Who is the other person?

A. That is my father.

Q. Whose signature appears at the bottom of this affidavit?

A. That is my father's signature.

(Testimony of Chow Seng.)

Q. I notice that this affidavit was sworn to on September the 17th, 1946, and sent to the American Consul. Therefore, it would appear that arrangements had been commenced before that photograph was taken in Canton City, isn't that a fact?

The Court: Well, of course, that is a matter of record. This witness would only have been about ten years old in '46.

A. That I don't know.

Mr. Hargreaves: I just wanted to point out, your Honor, that these photographs were taken after the arrangements had been started.

The Court: Well, apparently there is no question about [95] that, according to the record.

Mr. Hargreaves: I would like at this time to have Defendant's Exhibit B put into evidence.

The Court: Very well.

The Clerk: Defendant's Exhibit B admitted into evidence.

(Whereupon Defendant's Exhibit B for identification only was received in evidence.)

The Court: Let me ask you, Mr. Hertogs, you have other witnesses or will this make your affirmative case?

Mr. Hertogs: No, I have one more witness, your Honor.

The Court: And the Government has some witnesses, too?

Mr. Hargreaves: I don't expect any unless I have difficulty in some of the records being put into evidence.

The Court: Well, then, we could probably finish the matter tomorrow?

Mr. Hargreaves: Oh, yes.

Mr. Hertogs: I believe so, your Honor.

The Court: I am sorry that I have to adjourn a little bit earlier today, but we might possibly have finished today otherwise.

Mr. Hertogs: I don't know how long counsel expects to cross-examine the witness, but——

The Court: Perhaps we had better figure tomorrow and then we will have more time.

Mr. Hertogs: I have one witness who has—who is the [96] prior landed brother.

The Court: Well, then, I think to give you a chance to get your examination in shape, we will recess until tomorrow morning at ten o'clock.

Mr. Hertogs: Ten o'clock, yes, your Honor.

(Whereupon an adjournment was taken until ten o'clock tomorrow morning, Tuesday, December 9, 1952.) [96-A]

Tuesday, December 9, 1952—10:00 A.M.

The Clerk: Chow Yit Quong vs. McGrath, further trial.

Mr. Hertogs: Ready, your Honor.

Mr. Hargreaves: If the Court please, before I start cross-examination of the plaintiff, I noted your interest in the general pattern of these cases as to the boys and girls claimed, and I thought the Court might be interested in a little survey which was made by the Immigration Service back in 1929. I

know it is not, that is, it doesn't pertain to this specific case, but it is of general interest. At that time, 1929, the Immigration Service surveyed 2,337 claims and then a second survey of 8,509. In each case it came out 92 per cent boys and 8 per cent girls, and, of course, that is a little significant with this case.

The Court: Well, now, those who applied to come into this country?

Mr. Hargreaves: That's right, that is births in China. In both instances, both surveys, it showed that the claims were 92 per cent, 8 per cent girls, and, of course, that corresponds very closely to this case, where they have 90 per cent to 10 per cent. If the Court is interested, I would be glad to put this into evidence.

The Court: Well, you can leave it with the clerk.

Mr. Hargreaves: All right. [97]

Mr. Hertogs: I make a motion to strike the last remarks of counsel, your Honor, as immaterial, irrelevant, incompetent to the issues here, and constituting statistics remote from the present date.

The Court: Well, there is no doubt that—this is 1929, did you say?

Mr. Hargreaves: Yes, it was 1929, your Honor; it does not pertain to this case.

The Court: It is too remote in point of time. I don't know whether it is remote in point of fact or not, but at any rate, unless there was some more modern statistics of some kind, why, I doubt whether the matter would be of any particular moment—this having happened in 1929.

Mr. Hertogs: I still would like to move to strike the remarks, your Honor.

Mr. Hargreaves: Of course, your Honor, this was just brought to the Court's attention due to your Honor's remarks about the various claims, and the 1929 does go back to the time that the guardian ad litem was making the claims that are before the Court today.

The Court: Well, the remarks are there in the record and they are not altogether inconsistent with some of the discussion that we had in the matter. But what bearing it might have on this case, at the moment, I can't see. This is not a jury, and whether the remarks are stricken or not they [98] still remain in the record—even if they are stricken. They are there. So your motion is there and I simply don't feel that there is any need to act on it, because I have already heard the remarks.

Well, let's proceed with the evidence.

Mr. Hargreaves: Cross-examination of the plaintiff, please.

CHOW SENG

resumed the stand, and, having been previously sworn, testified further as follows:

Cross-Examination (Continued)

By Mr. Hargreaves:

Q. Mr. Fong, would you please advise the plaintiff he is still under oath?

(Interpreter to witness.)

(Testimony of Chow Seng.)

Q. (By Mr. Hargreaves): Do you recall testifying before the Immigration and Naturalization Service upon your arrival in San Francisco?

A. Yes, I did have.

Q. How many times has your father been married? A. Twice.

Q. When did you first see his second wife?

A. In my home village.

The Court: When, the question was.

A. In 1947.

Q. (By Mr. Hargreaves): Have you ever testified that you [99] first saw your alleged step-mother for the first time in Canton City?

A. I don't recall I have ever made that statement, but I know that I saw my step-mother for the first time in my home village.

Q. Where was your father married the second time? A. In Canton City.

Q. Were you present at the wedding?

A. No.

Q. Was there a wedding feast held in Canton City after the marriage? A. Yes.

Q. Were you present at that wedding feast in Canton City? A. No, I was not present.

Q. Have you previously testified at any time that you were present at that wedding feast in Canton City? A. I don't recall.

Mr. Hargreaves: I would like to direct the Court's attention to Interrogatory No. 4, in which the plaintiff admits having so testified before the Immigration Service. I am not sure of procedure

(Testimony of Chow Seng.)

here, your Honor. It will be necessary for me to introduce the Interrogatories? Or are they considered part of the pleadings?

The Court: Well, you have the right to refer to the answers to the interrogatories. Some lawyers offer the [100] answers to the interrogatories and the interrogatories into evidence. They are part of the record in the case.

Mr. Hargreaves: They are part of the pleadings. I wasn't quite sure, your Honor.

The Court: And, of course, the Court will take notice of anything that is part of the record in the case.

Mr. Hargreaves: Well, of course, I am only using them for the specific purpose of impeachment.

Mr. Hertogs: That is what I wanted to know, your Honor. It is being admitted solely for the purpose of impeachment; then I have no objections.

The Court: Very well.

Q. (By Mr. Hargreaves): Have you ever resided in Kwantung, Po Village?

A. Yes, I have.

Q. For what period? A. In 1947.

Q. How long were you in Kwantung, Po Village, at that time? A. About two weeks.

Q. Had you ever been in Kwantung, Po Village, prior to that time?

A. When I was very small.

Q. Have you ever made a statement to any per-

(Testimony of Chow Seng.)

son at any time that you had never been in Kwantung, Po Village?

A. I can't remember. [101]

Q. Have you ever made a statement to any person at any time that you didn't even remember that village?

A. I don't recall making any such statement.

Q. On September the 20th, 1950, you appeared before Inspector Pauson of the Immigration Service, at which time you testified? Do you recall that incident?

A. I don't remember the dates.

Q. I have here a certified copy of the testimony and ask you if this is your signature?

A. Yes, that is my signature.

Q. The question appears on page 6, "When was the last time you were in Kwantung, Po Village." The answer appears, "I don't even remember that village." Did you make that answer?

A. I am not clear on that.

Mr. Hargreaves: Ask that the certified copy of the record be marked for identification.

The Clerk: Defendant's Exhibit C marked for identification.

(Whereupon record referred to above was marked Defendant's Exhibit C for identification only.)

Mr. Hargreaves: At this time, your Honor, I would like to offer this certified record into evidence for the purpose of impeachment.

Mr. Hertogs: I object, your Honor, on the

(Testimony of Chow Seng.)

grounds it is hearsay. This is a trial *de novo*, that is not admissible in [102] evidence. They have not proved the statement, the man has denied it; they must prove that statement themselves by other competent evidence. The statement itself is not admissible, the statement they are attempting to introduce is a complete statement and is not limited solely to this one question which they are raising at this time.

The Court: Well, the witness has answered that he doesn't recall, is that right?

(Record read.)

Mr. Hargreaves: The purpose for which I wish to introduce this document, your Honor, the fact that the witness has testified that he was in Kwantung, Po Village, for a period of two weeks, he has also testified that he was there when he was younger. Now, during the course of this prior testimony the record indicates that he stated he didn't even remember the village. Now that certainly goes not only to his credibility but admission against interest at the prior hearing.

The Court: Yes. Well, I think that may be, but I don't know what else is in that record, Mr. Hargreaves. You offered the whole record.

Mr. Hargreaves: I was offering it for the limited purpose of those statements.

The Court: Oh, well, if that is the case——

Mr. Hertogs: He has read the statements in the record, [103] your Honor.

(Testimony of Chow Seng.)

The Court: Well, you have it marked for identification and you have read statements into evidence, so you have your record on that.

Mr. Hargreaves: Yes, I mean, I just want the Court to understand what those statements were.

The Court: Well, you have read it.

Mr. Hargreaves: Yes, I have read them in the record.

The Court: You have read it in the record, what you want?

Mr. Hargreaves: Yes, sir.

The Court: All right, just leave it marked for identification, then, so there won't be any question as to the accuracy of the statements.

Mr. Hertogs: We question the accuracy of it, your Honor.

The Court: I beg pardon?

Mr. Hertogs: We do question the accuracy of it. I might state at this time, your Honor, they have propounded a number of interrogatories, as you can see from the record, in this particular case. All of the interrogatories which they have propounded deal with the discrepancies that arose during the entire examination of this boy, not only by the Board of Special Inquiry but on primary inspection, which is the document that you have there. Every single discrepancy that you can find in the Immigration Record is set forth in [104] full in the interrogatories. I have been very careful on these, I have gone over these things very thoroughly with these boys. We are not denying that he made a

(Testimony of Chow Seng.)

number of these statements. They were wrong. There is no doubt about it. He has admitted that they were wrong. But he has denied two parts and two parts only of those interrogatories, and I think that the burden is on the Government to show that he did answer those interrogatories as indicated in the record, because he says he does not recall answering those questions in that manner.

The Court: Well, he signed.

Mr. Hertogs: Yes, your Honor, but you can ask him——

Q. (By Mr. Hertogs): Were these questions and answers read back to you after they were typewritten? A. No.

Mr. Hertogs: Another thing, your Honor, is this, that when they signed the record, it is the policy of the Immigration and Naturalization Service to tell them, to tell these people, that the purpose of signing this document is to show they were present, not as to what is there, because otherwise these people in the past have asked them to read the entire record back. And that is practically impossible, due to the volume of business that they have. Therefore, when they sign this, that is an indication they were present, and that they did testify on that date. And this man admits that he appeared [105] and testified on that date.

The Court: Well, they have, I suppose—I notice here that there is a stenographer-interpreter who did this.

Mr. Hertogs: Yes, your Honor.

(Testimony of Chow Seng.)

The Court: Well, do you want her to be brought here to testify that her transcript is correct on that?

Mr. Hargreaves: Well, your Honor, I deliberately offered this in evidence without calling her. She is in the courtroom. However, the Immigration Service is presented with this problem, that in most of these cases there may be anywhere from three to five people or maybe six people that have to be called in order to actually identify a record. Some of those people are no longer with the service. And I believe, your Honor, that under the——

The Court: You say that the young lady who took this record is here?

Mr. Hargreaves: She is here, your Honor, but I hoped to obtain a ruling for future cases, because we are faced with a serious problem of attempting to bring in personnel who are no longer with the service.

The Court: Well, if this matter of the discrepancies, the alleged discrepancies, is important, you had better—when the time comes—put this young lady on the stand and have her testify as to the accuracy.

Mr. Hertogs: I will go along with him, your Honor. We [106] have admitted all but two things in this, and at this time, as I stated before, I have gone down very thoroughly with this boy on each one of them and he says he thinks he may have said that, and where he said and I told him the record indicated that he had said that, he wasn't sure whether he did or didn't, we have admitted it by the

(Testimony of Chow Seng.)

interrogatories. However, in the cases where he indicated to me that he did not feel that he made such a statement, we find it necessary to deny that that is a proper record.

The Court: Well, as long as the lady is here, put her on the witness stand, Mr. Hargreaves; I am not interested in making rulings on this matter that will govern future proceedings; as this is the precise issue in this case and it is of importance and the stenographer is here, she can testify as to it.

Mr. Hargreaves: All right, your Honor.

Q. (By Mr. Hargreaves): You have just now testified that you were in Kwantung, Po Village, for two weeks. Is that correct?

A. About two weeks.

Q. How large is Kwantung, Po Village?

A. Not very large.

Q. Approximately how many houses?

A. Four houses.

Q. Have you ever testified or stated to any person that [107] Kwantung, Po Village, consisted of approximately 30 houses? A. No.

Q. You are positive you never stated to any person at any time that Kwantung, Po Village, consisted of 30 odd houses?

A. I said there were three houses, not 30, and one was the ancestral hall.

Q. What is the Chinese word for three?

The Interpreter: "Sam."

Q. (By Mr. Hargreaves): What is the Chinese word for 30?

(Testimony of Chow Seng.)

The Interpreter: "Samsup."

Q. (By Mr. Hargreaves): Is there any reason why an interpreter would be confused between the word "Sam" and "Samsup"?

A. Well, I don't know. Maybe he misunderstood me.

Q. You have already stated that you appeared and testified before the Immigration Service. I direct your attention to page 26 of the VSI Report and ask if this is your signature? A. Yes.

Mr. Hertogs: What page?

Mr. Hargreaves: 26 was the signature.

The Court: That is contained in the interrogatories, isn't it?

Mr. Hargreaves: He denies, your Honor, that he said——

The Court: What?

Mr. Hertogs: That is the second point.

Mr. Hargreaves: He denies that he stated there were 30 [108] houses in the village.

The Court: Now you want to offer it? Read it.

Mr. Hargreaves: Well, I can read the questions and answers into the record.

The Court: All right.

Mr. Hargreaves: Or I can offer it in the record for the limited purpose——

The Court: Well, why don't you have that particular testimony marked for identification and then read into the record the portion that you wish to offer?

Mr. Hargreaves: All right, your Honor. It has

(Testimony of Chow Seng.)

been marked for identification as Defendant's Exhibit A.

The Court: Oh, all right. Well, read your question.

Mr. Hargreaves: And on page 22 I would like to read the following questions and answers:

"Describe the Kwantung, Po Village, as it was when you claimed to have seen it in 1947."

Now this portion he admits: "It was raining and I couldn't go out. I don't know how many houses there were or how many rows of houses."

"How many days did you stay in Kwantung, Po Village, in 1947?"

"About ten days."

"If you were actually in Kwantung, Po Village, for about ten days, you should be able to give [109] us a fairly good idea of how that village was laid out.

Will you state how many houses in all you saw in that village in 1947?

"30 odd houses."

Now that is the one question he does not admit making, or answer, rather.

The Court: Now is that taken by the same stenographer?

Mr. Hargreaves: Yes, by the same stenographer. There's a couple of other questions here that are very interesting, your Honor:

"And you say that the house in which you, your father and your step-mother lived in 1947 was about

(Testimony of Chow Seng.)

in the center of those 30 odd houses in Kwantung, Po Village?

“It was not exactly in the center, but it was near it.”

Now he admits making that statement.

“Is that house near the front or the rear of the village?

“I don’t know which side was considered the front and which side was considered the rear of the village.

“Were there houses in front and to the rear of the house in which your father and step-mother lived in Kwantung, Po Village, when you were there [110] in 1947?

“Yes.

“Were there houses on each side of the house in which you persons then stayed? A. Yes.”

Now he admits making those statements, the only question is as to the number.

Q. (By Mr. Hargreaves): During the time you were in Kwantung, Po Village, what were the sleeping arrangements?

A. I was sleeping in the house.

Q. Did you and your alleged father and step-mother sleep in the same house?

A. I slept in the old house.

Q. Where did your alleged father and step-mother sleep?

A. My father and step-mother slept in another house.

(Testimony of Chow Seng.)

Q. Have you ever testified or stated to any person that during your stay in Kwantung, Po Village, that you, your father and your mother, your step-mother rather, all slept in the same house?

A. I am not clear on that.

Q. Were you ever asked the question, "Did you sleep in the same house with your father and your step-mother each and every night while you folks stayed in Kwantung, Po Village, in 1947," and did you answer, "Yes" to that question?

A. I didn't say we were sleeping in the same house. [111]

Mr. Hargreaves: I would like to invite the Court's attention to Interrogatory No. 9, where he admits making that statement, your Honor.

The Court: Well——

Q. (By Mr. Hargreaves): What relatives do you have in Kwantung, Po Village?

A. I know there is a Mrs. Chow there.

Q. Does your father have any brothers or sisters?

A. None of them were living there.

Q. Please answer the question. Does your father have any brothers or sisters?

A. Yes.

Q. How many brothers or how many sisters?

A. Two, including my father.

Q. Two what?

A. My father had an older brother.

Q. What was his name?

A. Chow Seng Quong.

Q. Does he have any children?

A. Yes, he has.

(Testimony of Chow Seng.)

Q. How many children?

A. That I am not clear.

Q. Have you ever seen any of Chow Seng Quong's children? A. Yes, I have seen them.

Q. When and where? [112]

A. In Kwantung, Po Village.

Q. Who did you see in Kwantung, Po Village?

A. A Chow Yun, Chow Sun.

Q. Did you sleep in the same house with them during the time you were in Kwantung, Po Village? A. Yes.

Q. Have you ever stated to any person that you had never seen any of Chow Seng Quong's children? A. I am not clear on that.

Q. Did you ever state to any person that you did not know the names of any of his children?

A. I did tell somebody that I didn't remember it, but I do now.

Mr. Hargreaves: I would like to direct the Court's attention to Interrogatory No. 10, the latter portion, in which he admits making those statements.

Q. (By Mr. Hargreaves): What was the name of your blood mother?

A. Wong Suey Hong.

Q. When and where did she die?

A. As to the date, I don't remember. But she died in Kwantung, Po Village.

Q. Can you give the approximate date of her death?

(Testimony of Chow Seng.)

A. I believe it was the 32nd year of the Chinese Republic.

Mr. Hertogs: That is 1943, your Honor. [113]

Q. (By Mr. Hargreaves): Have you ever stated to any person that your mother passed away in Macao?

A. I am not clear on that.

Q. Were you asked the question at the time of your hearing before the Immigration Service's examiner, "Describe your blood mother," and did you answer, "Her name was Wong Suey Hong, she died in Macao in 1943."?

The Court: These have been denied?

Mr. Hargreaves: No, they are admitted.

Mr. Hertogs: They are admitted in the interrogatories, your Honor.

A. I don't remember.

The Court: How far is Macao from Kwantung, Po Village?

The Witness: Not very far.

The Court: Well, how far?

The Witness: I have to walk several hours, but I don't know the distance.

The Court: How far is Canton City from Kwantung, Po Village?

The Witness: About two days by boat.

The Court: Two days by boat.

Q. (By Mr. Hargreaves): Is it possible to actually walk from Macao to Kwantung, Po Village?

A. No.

Q. How long does it actually take to travel from Kwantung, [114] Po Village, to Macao or vice

(Testimony of Chow Seng.)

versa? A. Oh, that I don't know.

Q. Isn't it a fact that Kwantung, Po Village, is supposed to be in the Chung Shan District?

A. Yes.

Q. Do you have a sister?

A. Yes, I have a sister.

Q. Is she alive? A. No.

Q. When and where did she die?

A. She died in Kwantung, Po Village, but I don't remember the date.

Q. Where is she buried?

A. In Kwantung, Po.

Q. Where is your mother buried?

A. Kwantung, Po.

Q. Who died first, your mother or your sister?

A. My sister died first.

Q. Have you ever testified before any person that your sister died in Macao and was buried there?

A. I am not clear.

The Court: That is also included in the answers to the interrogatories?

Mr. Hargreaves: Yes, your Honor, that is admitted. I might also draw attention to his admitted testimony that he [115] testified that his father removed the body of his mother from Macao and reburied it in Kwantung, Po Village. He admits that statement.

Q. (By Mr. Hargreaves): Have you ever resided in Quei Yung City? A. Yes.

Q. Did your alleged father visit you there?

A. He did.

(Testimony of Chow Seng.)

Q. How long were you in Quei Yung City?

A. After my mother's death I went to live in Quei Yung until my father returned to China and took me to Canton City.

Q. During that time did you reside in one location or one residence in Quei Yung City?

A. I resided only in one residence.

Q. You stated that you moved to Quei Yung City when your mother died. Where were you living at that time?

A. I moved from Kwantung, Po, to Quei Yung.

Q. That is Kwantung, Po Village?

A. Yes.

Q. Can you describe the house in which you lived in Quei Yung City, a very general description?

A. It is a big house in three sections, that is, divided into three roofs.

Q. Are there three separate buildings?

A. It is all connected together. [116]

Q. Are there any lofts in any of those buildings?

A. Yes, there was a loft there.

Q. Did you ever state to anyone that there were no lofts in any of those rooms or buildings?

A. I believe somebody asked me about it, but I didn't know what a loft was.

Q. I will read you a question: "If someone were to say that there was a wooden loft in a premises at 58 Fat Yuen Road, Quei Yung City, while you lived there, and that there were several rooms in that wooden loft, what would you say?"

(Testimony of Chow Seng.)

“A. I would say there are none.”

Did you make that answer?

A. Well, I am not clear on that.

Mr. Hargreaves: I direct the Court's attention to Interrogatory No. 12 in which that statement is admitted.

Q. (By Mr. Hargreaves): You have stated that you were residing in Kwantung, Po Village, prior to the time you went to Quei Yung City and prior to your mother's death. How long had you been living there? A. Less than a year.

Q. Is that the same period which you stated previously that you resided in Kwantung, Po Village, for approximately eight months?

A. Yes.

Mr. Hargreaves: No further questions, your Honor. [117]

Redirect Examination

By Mr. Hertogs:

Q. Do you remember moving from Macao to Quei Yung City? A. I don't remember.

Q. Do you actually remember moving from Macao to Kwantung, Po Village, and then to Quei Yung City? A. I believe so.

Q. Do you remember actually moving and living in Kwantung, Po Village, shortly after or shortly before the death of your mother? A. Yes.

Q. Now you previously testified at the time of the Board of Special Inquiry hearing that your

(Testimony of Chow Seng.)

mother had died in Macao. Now why did you make that statement at that time?

Mr. Hargreaves: I think I will object to the question, your Honor, as self-serving—any explanation at this time when he makes an admission of the statements.

The Court: Well, I think the witness always has a right to make such explanation as he wishes of inconsistent statements, if he wishes to make any. Overruled.

A. When my mother died I was very small then and I had been sick most of the time, and when my father removed the body and we buried the bones at Kwantung, Po Village, that was the time that I knew she was buried in Kwantung, Po Village.

Q. Why did you testify that she had been—that she died [118] in Macao?

A. Well, the fact is she died in Kwantung, Po Village.

Q. Do you remember the death of your mother?

A. No, I don't remember.

Q. Now during the Board of Special Inquiry hearing conducted by the Immigration and Naturalization Service, in reply to a question as to whether or not you remembered even moving from Macao to Quei Yung City, you stated you did not remember at all. Now that is in conflict with the statement you have just made. Now are you testifying today from facts which have come to your knowledge

(Testimony of Chow Seng.)

subsequent to your release or are you testifying from facts of your own knowledge?

The Court: That is an awfully difficult question for the interpreter to put to him for him to answer. It takes a lawyer to answer that one.

Mr. Hertogs: It takes a lawyer to ask it, your Honor.

The Interpreter: Will you please read the question again?

The Court: I don't want to—but when he asks a person whether they are testifying of their own knowledge or—that is asking a legal question.

Mr. Hertogs: That is the difficulty we are confronted with.

The Court: Well, why don't you put the question in a simpler form?

Mr. Hertogs: All right. [119]

Q. (By Mr. Hertogs): You previously testified before the Immigration Service that you did not remember the trip from Macao to Quei Yung. Do you recall that statement?

A. I don't remember.

Q. Approximately how old were you at the time of the death of your mother?

A. I was very small.

Q. Do you remember?

The Court: That isn't any answer. He was about 10 or 11 years old.

Mr. Hertogs: About eight and a half, your Honor.

The Court: How old is he now?

(Testimony of Chow Seng.)

Mr. Hertogs: He was born in August of 1934 and the mother died in March or February—February or March of 1943, which would have made him——

The Court: Going on to nine years old.

Mr. Hertogs: Going on to nine years old.

Q. (By Mr. Hertogs): At the time you previously testified before the Immigration——

The Court: Well, of course, even at that age he should remember something about that.

Mr. Hertogs: I doubt that, your Honor.

The Court: In order that you may be sure about it, why don't you ask him again, counsel, if you want your record clear? Ask him if he has no recollection at all. [120]

Q. (By Mr. Hertogs): Do you have any recollection at all concerning the death of your sister and your mother—personal recollection?

A. I remember that when they died, why, I wasn't even permitted to be near them on account of their having contagious diseases.

The Court: Well, then, you do remember your mother and you remember the time she died?

The Witness: No, I don't remember.

Mr. Hertogs: I have no further questions, your Honor.

The Court: That's all of the witness?

Mr. Hargreaves: That's all for me, your Honor.

The Court: That's all.

(Witness excused.)

Mr. Hertogs: The witness we would like to call is Chow Sam, your Honor. Chow Sam.

The Court: Will the interpreter be needed?

Mr. Hertogs: I think so, your Honor. If we don't, we will have difficulty for the reporter.

CHOW SAM

called on behalf of the plaintiff; sworn.

The Clerk: Please have the witness state his name for the record.

A. (Through the Interpreter): Chow Sam.

Q. Please spell his name. C-h-o-w?—— [121]

A. (Through the Interpreter): S-a-m.

(Answers given through interpreter except as otherwise noted.)

Direct Examination

By Mr. Hertogs:

Q. Are you a United States citizen?

A. Yes.

Q. Do you have any proof of your United States citizenship with you? A. Yes.

Mr. Hertogs: May I see it?

(Witness indicated back of courtroom.)

Mr. Hargreaves: I believe it is a matter of record, your Honor. We have already read into the record that he was admitted on an appeal after exclusion by a Board of Special Inquiry, as a citizen.

The Court: Is this the son?

(Testimony of Chow Sam.)

Mr. Hargreaves: This was the son that was excluded by the Board of Appeals and was admitted in San Francisco.

Mr. Hertogs: Will the Government stipulate that this boy was admitted to the United States as the son of Chow Yit Quong?

Mr. Hargreaves: I will stipulate the Commissioner of Immigration overruled the Board of Special Inquiry and admitted him as a citizen.

Mr. Hertogs: Based upon—— [122]

Mr. Hargreaves: I would not admit that he is a citizen.

Mr. Hertogs: Based upon his relationship to Chow Yit Quong?

Mr. Hargreaves: Yes.

Q. (By Mr. Hertogs): Where were you born?

A. China.

Q. What village? A. Kwantung, Po.

Q. And what was the date of your birth?

A. July 3rd, Chinese.

Q. July 3rd, Chinese? In what year?

A. (In English): 12 Chinese.

The Interpreter: Twelfth year of the Chinese Republic.

Mr. Hertogs: That would be August 14, 1923, your Honor, in American reckoning.

Q. (By Mr. Hertogs): What is the name of your father? A. Chow Yit Quong.

Q. And is he in the courtroom at this time?

A. Yes.

Q. And will you identify him, please?

(Testimony of Chow Sam.)

A. (Standing and pointing.)

Q. Right there? And what was the name of your mother? A. Wong Suey Hong.

Q. And did you have a brother by the name of Chow Seng? A. Yes. [123]

Q. And where was the said Chow Seng born?

A. In Canton.

Q. Canton. Do you recall the date of his birth?

A. No, I don't remember.

Q. Do you remember the year he was born?

A. Don't remember that.

Q. How old is he? A. He is 18.

Q. 18 years old. And he was born in Canton City?

A. Yes, Chow Seng was born in Canton City.

Q. And were you living with the family at that time, with your family? A. Yes, I guess.

Q. Now how long did you live with Chow Seng in China?

A. I think about six or seven years.

Q. Six or seven years. And did you live together? A. Yes, we lived together.

Q. Did you live in the same house?

A. Yes.

Q. Did you have your meals together?

A. Yes.

Q. Did you sleep together in the same house?

A. Yes, slept in the same house.

Q. Did Chow Yit Quong reside with you at that time? A. Yes. [124]

(Testimony of Chow Sam.)

Q. Did you and Chow Seng speak to one another as brothers? A. Yes.

Q. Did you introduce Chow Seng to your friends as your brother? A. Yes.

Q. Did your father, Chow Yit Quong, introduce Chow Seng to persons as his son?

Mr. Hargreaves: Well, object to that, your Honor.

The Court: What?

Mr. Hargreaves: Object to that. Chow Seng or Chow Yit Quong would be the best witness to testify as to what he did.

The Court: Well, overruled.

A. Yes.

Q. (By Mr. Hertogs): Did you treat this Chow Seng as your brother? A. Yes.

Q. Did Chow Yit Quong treat Chow Seng as his son? A. Yes.

Q. Is Chow Seng your blood brother?

A. Yes.

Q. Was Chow Seng born of your mother, Wong Suey Hong? A. Yes.

Q. Chow Yit Quong is the blood father of Chow Seng? A. Yes.

Mr. Hertogs: I have no further questions, your Honor. [125]

The Court: Well, we will take a brief recess for five minutes.

(Recess.)

(Testimony of Chow Sam.)

Cross-Examination

By Mr. Hargreaves:

Q. You have just testified your mother gave birth to Chow Seng. How do you know she did?

A. My mother told me.

Q. Were you present in the house at the time of the birth? A. Yes.

Q. When did you arrive the United States?

A. 1940.

Q. Who accompanied you to the United States?

A. My father and my brother, Chow Hing.

Q. Do you recall that you and your brother, Chow Hing, were excluded by the Immigration and then admitted on appeal; is that correct?

A. That's correct.

Q. Do you recall the grounds on which the exclusion was based as to your brother Chow Hing?

Mr. Hertogs: I object to the question, your Honor. It is incompetent, irrelevant and immaterial as to the question of identity as to this one, as to why a case was taken on appeal and reversed on appeal. The Government is seeking to get this record adverse—is trying to get adverse material to this defendant into the record here, which was overruled. [126]

The Court: Well, it may have some possible connection with the mother, but it is hard for me to determine at this moment, and it is not important whether he recalls it or not. It is a preliminary question, I take it. Overruled.

(Testimony of Chow Sam.)

The Interpreter: May I have the question again?

The Court: The question was whether he recalls the grounds upon which his brother, who arrived in 1940, was originally denied admission to the United States by the Immigration Department.

A. I believe it was on account of an age question.

Q. (By Mr. Hargreaves): Isn't it a fact that the United States Public Health Service had found by medical examination that Chow Hing was five to seven years younger than the age claimed?

A. Yes.

Q. Where have you resided since your entry into the United States? A. In San Francisco.

Q. Where has Chow Hing resided since his entry into the United States?

A. Well, he lives in San Francisco, until his entry in the Army.

Q. Did he reside continuously in your home in San Francisco until his entry in the Army?

A. Well, we lived together for about two or three years, [127] then on account of the limited space, we moved apart.

Q. Where did he live after the first two or three years, I mean Chow Hing?

A. Then he moved in with my father and I lived separately.

Q. Were you and Chow Hing and your father all residing together for the first two or three years?

A. Yes.

(Testimony of Chow Sam.)

Q. Then after the first two or three years you left; is that right? A. Yes.

Q. And where did you go?

A. Still in San Francisco.

Q. Who did you live with?

A. I lived by myself.

Q. Did Chow Hing continue to reside with your father? A. Yes.

Q. Did he reside continuously with your father until his entry into the Army? A. Yes.

Q. Did you visit your father's home during those years after you left until Chow Hing entered the Army? A. Yes.

Q. When did Chow Hing enter the Army?

A. Four or five years ago.

Q. Was it 1946? [128]

A. I think it was between '45 and '46.

Q. Isn't it a fact that Chow Hing did not reside with your father in San Francisco from May, 1943, until the time he entered the Army?

A. Yes, he was living at the Chung Mei Home.

Q. In other words, he was taken care of by the Chung Mei Home in El Cerrito from 1943 until the time he entered the Army and did not reside with your father; is that correct?

A. Yes, that's correct.

Q. Then neither of you have resided in the home of your father since two or three years after your entry; isn't that correct? A. Yes.

Mr. Hargreaves: No further questions, your Honor.

(Testimony of Chow Sam.)

Mr. Hertogs: Ask the Government to stipulate that the record of admission of Chow Hing at the time that his application for admission to San Francisco indicates that he claimed birth in China at Kwantung, Po Village, on July 29, 1927.

Mr. Hargreaves: That is correct.

Mr. Hertogs: And what is the date of his admission to the Army? You have it there.

Mr. Hargreaves: 1946.

Mr. Hertogs: 1946, your Honor—19 years old. Their records indicated he was supposed to have been five years [129] younger, but yet the Army took him.

Mr. Hargreaves: I might state also, your Honor, the Draft Board refused to take him because he was immature and had to take a certification from immigration records before he was admitted.

Redirect Examination

By Mr. Hertogs:

Q. How long did your brother Chow Hing serve in the Army?

A. He was drafted in the Army for about two years, and after he was discharged, he volunteered in again.

Q. How long did he stay in again when he volunteered?

A. Two or three years.

Mr. Hertogs: I have no further questions, your Honor.

The Court: How old are you now?

A. 29.

(Testimony of Chow Sam.)

Q. Where do you live now?

A. Number 644 Pacific Street, San Francisco.

Q. What is your occupation?

A. I am in the restaurant business and the grocery business.

Q. In San Francisco?

A. In San Francisco.

Q. How long have you been in that business?

A. On account of my health I am not doing anything now, but I have been in the restaurant business for four or five years and most of the other time I am a groceryman. [130]

Q. How long have you been doing nothing?

A. About three months.

Q. Take care of yourself, do you—support yourself?

A. Yes.

Q. Are you married?

A. No.

Q. Have you ever been married?

A. No.

Mr. Hertogs: I have another question I would like to ask, your Honor.

Redirect Examination

(Resumed)

By Mr. Hertogs:

Q. Now——

The Court: What is the name of his other brother?

Mr. Hertogs: Chow Hing.

The Court: Has your brother Chow Hing—is he married?

A. No.

Q. Has he ever been married?

A. No.

(Testimony of Chow Sam.)

Q. (By Mr. Hertogs): I will show you Plaintiff's Exhibit No. 2 and ask you if you can identify those individuals? A. Yes, I do.

Q. Who are they from right to left?

A. The one on the right is Chow Seng and the other is my sister, Chow Soo. [131]

Q. And is Chow Seng present in the courtroom at this time? A. Yes.

Q. Now, calling your attention to the picture of Chow Seng, does this boy look like the boy that you last knew in China before your entry to the United States as Chow Seng? A. Yes.

Q. He looked like this boy, is that correct?

A. Yes.

Q. And you are referring to the boy that was born of your mother in about 1934? A. Yes.

Mr. Hertogs: I have no further questions, your Honor.

The Court: How old were you when you came to the United States?

A. 17 years old.

Q. How many brothers did you have?

A. Nine brothers and one sister.

Q. Do you remember Chow Yit Quong coming over to China when you were a boy there?

The Interpreter: Coming to the United States, you mean?

The Court: No, no, I say, you remember Chow Yit Quong coming over to China when you were a boy there? A. No, I don't remember.

Q. Don't remember that? What year did you come to the United States? [132] A. 1940.

(Testimony of Chow Sam.)

Q. Well, you came over—you said you came over with Chow Yit Quong.

A. I remember the events when my father went to China and brought me over.

Q. Well, you remember your father being in China at that time? A. Yes.

Q. What did your father do when he came over to China? A. No, he has nothing to do.

Q. Didn't do anything?

A. No, didn't do any work.

Q. Did your mother do any work?

A. The usual housework.

Q. Any of the boys—did he or his brothers do any work? A. No, doing nothing.

Q. How did they live?

A. Well, we live on our father.

Q. They lived on a farm?

The Interpreter: No, on the father.

The Court: On the father? All right. Anything else?

Mr. Hertogs: No, your Honor.

The Court: Anything else?

Mr. Hargreaves: No, your Honor.

The Court: That's all. [133]

(Witness excused.)

Mr. Hertogs: We have no further witnesses, your Honor.

Mr. Hargreaves: If the Court please, I would like to call Mrs. Fong at this time to identify the record.

JENNIE L. FONG

called on behalf of the defendant, sworn.

The Clerk: Will you please state your full name to the Court?

A. Jennie L. Fong.

Direct Examination

By Mr. Hargreaves:

Q. Mrs. Fong, what is your occupation?

A. I am employed as a stenographer-interpreter with the Immigration Service.

Q. How long have you been so employed?

A. Since January 23rd, 1950.

Q. Have you qualified under the Civil Service examination as a stenographer? A. Yes.

Q. Are you also qualified as an interpreter?

A. Yes.

Q. In what language?

A. In Toy-shan dialect and Canton City dialect.

Q. Those dialects? A. Chinese. [134]

Q. You mean in Chinese? A. Yes.

Q. Now, what method is used by the Immigration Service in recording testimony?

A. I immediately type down all the questions as they are asked and all the answers as they are given to me.

Q. You mean it is taken down directly on the typewriter? A. Yes.

Q. As the questions are asked and answered—it is not taken in shorthand, is that correct?

A. Yes, that's correct.

Q. I now show you a certified file of the Immi-

(Testimony of Jennie L. Fong.)

gration Service which has been marked Defendant's Exhibit C for identification and ask you if you recognize it?

A. The signature appearing on page 6 is my signature.

Q. You say that this is your signature on page 6?

A. That's right.

Q. This indicates that you did appear at the hearing, is that correct? A. Yes.

Q. I notice that on the first page it shows "Stenographer, Jennie L. Fong," is that correct?

A. Yes.

Q. Do you actually recall the questions and answers which were given during the course of this hearing? [135] A. No.

Q. In other words, you remember that you were there, but you can't say what questions were actually asked and answered, is that correct?

A. Yes, that's correct.

Q. Was it made in the regular course of business?

The Court: You took them down, though?

The Witness: I did.

The Court: You took the questions down in English and the answers down in English after they had been interpreted?

The Witness: That's correct.

The Court: From the Chinese language into the English language?

The Witness: Yes.

Mr. Hargreaves: In other words, your Honor,

(Testimony of Jennie L. Fong.)

she does this every day of the year, and it is impossible for her to remember the exact questions and answers that were given.

The Court: Well, ask her whether or not to the best of her recollection she did or did not transcribe these questions and answers correctly—answers given by the witness.

Q. (By Mr. Hargreaves): Can you answer that question of the Court's? A. Yes, I did.

Q. Is this the original record?

A. Yes. [136]

Q. Now, you stated that you also understand the Chinese language and have qualified as an interpreter. If the interpreter himself, who was used at this hearing, had made an error, you would have been in a position to have noticed it, isn't that right?

A. Yes, I would have.

Mr. Hargreaves: I have no further questions, your Honor.

Mr. Hertogs: I have one or two, your Honor.

Cross-Examination

By Mr. Hertogs:

Q. This record indicates on page 1 that the interpreter at this hearing was Thomas H. Gee, is that correct? A. Yes.

Q. That means that the questions were propounded by the examining officer to the witness through an interpreter and that that interpreter was Thomas Gee, is that correct?

A. That's right.

Q. And the answers that you recorded were an-

(Testimony of Jennie L. Fong.)

swers that were given by the witness to Thomas Gee, Thomas Gee translated it into the English and you recorded what Thomas Gee said in English, is that correct? A. That's correct.

Q. Then actually what you wrote down would be the English version of the answer as given by the interpreter? A. That's right. [137]

Mr. Hertogs: I have no further questions, your Honor.

The Court: What was that question and answer about the three and 30 there?

Mr. Hargreaves: This one here, your Honor, is—regarding that he didn't even remember Kwantung, Po Village.

The Court: No, no, I mean, this part of the record here in which the witness was asked how many houses there are in the village.

Mr. Hargreaves: That is in the other record, your Honor. That is in the V.S.I. record, your Honor. This is the primary statement.

The Court: What dialect was this done in, do you know?

Mr. Hargreaves: Cantonese, your Honor.

The Court: All right, what is the Chinese word for three—what is the Cantonese for the word three?

The Witness: Sam.

The Court: And what is it for thirty?

The Witness: Sam sup.

The Court: Sam sup?

The Witness: Hm-hm.

The Court: How would you spell that in English,

(Testimony of Jennie L. Fong.)

how would you try to phonetically put it into English?

The Witness: Well, it could be sup or sop.

Mr. Hertogs: Sam is usually spelled s-o-m?

Mr. Hargreaves: S-o-m. [138]

The Court: All right.

Mr. Hargreaves: I would like to also, your Honor, identify the Board of Special Inquiry——

Mr. Hertogs: I will stipulate that testimony would be the same as to the Board of Special Inquiry, your Honor.

Mr. Hargreaves: She also typed the Board of Special Inquiry hearing.

The Court: Very well.

Mr. Hargreaves: Any further questions?

Mr. Hertogs: No further questions.

The Court: That's all.

(Witness excused.)

Mr. Hargreaves: I believe, your Honor, I should now again offer these records into evidence.

Mr. Hertogs: I object, your Honor, on the same grounds as previously, that such records are not admissible.

The Court: Well, they may be only admitted to the extent that they are impeaching, that's all.

Mr. Hargreaves: That's all, your Honor, and for the limited purpose of those specific questions which he denied.

Mr. Hertogs: Which have already been read into the record.

The Court: Well, so the record will be clear, they may be admitted for that particular and special purpose and directed to those special questions and answers that are set [139] forth in the interrogatories and the answers to the interrogatories.

Mr. Hertogs: You mean as to the denial?

The Court: That's right.

The Clerk: That's A and C both?

Mr. Hargreaves: Yes, A and C.

The Clerk: Defendant's Exhibits A and C admitted as limited.

(Whereupon Defendant's Exhibits A and C for identification only were received into evidence as limited above.)

Mr. Hargreaves: I have no further witnesses, your Honor.

The Court: The evidence is concluded in the case?

Mr. Hargreaves: Yes, your Honor.

The Court: On both sides?

Mr. Hertogs: Yes, your Honor.

At this time, your Honor, in summation, I would like to state that at the time of the Board of Special Inquiry, at the time of the original examination by the preliminary examiner before the Immigration and Naturalization Service, this plaintiff was not represented by present counsel. If he had been represented by present counsel at that time, I definitely would have asked for a reopened hearing in order that the documentary evidence which we have offered into evidence here before the Court, and

the witnesses which we have presented before the Court, would have been introduced [140] and would have been given proper consideration by the Immigration and Naturalization Service. The hearing conducted there was not complete; it is an unfortunate situation. The pictures which have been presented in evidence before the Court were not introduced, were not even shown to the Immigration and Naturalization Service.

The tax returns which we have introduced as evidence, which show the consistent claims of the father for a boy named Chow Seng, were not introduced and given consideration by the Immigration and Naturalization Service. No effort was made, the father was not even told that he should attempt to have his prior landed sons appear and testify as witnesses in behalf of this plaintiff.

In addition, here he had a friend who was in China who was present and who saw this boy in his own home in China, who could have likewise testified as to this relationship. Unfortunately none of that evidence was given consideration at that time. It was not until this case was denied by the Immigration and Naturalization Service and this boy was about to be removed from the United States that this man came to see me.

I took one look at the record, those are the things which we have admitted here and which have not been denied to the interrogatories, those discrepancies. I told the man that [141] those discrepancies looked and appeared to be serious to me. I told him that I didn't think that there was a chance

to win a case. I refused to take it. He came back to me a second time and I still refused to take this case. He came back a third time and I still refused to take it. The man pleaded with me to come over and have a talk with him and his son over in the detention facilities of the Immigration and Naturalization Service. I made a trip to the Immigration and Naturalization Service with this man, I saw this man and this boy together. I saw the greetings of that man and that boy and I was satisfied concerning this relationship. I didn't care what the record showed. I said, "Now let's find how we can establish this claim. I am satisfied beyond any doubt that this is your boy and your bona fide son." I took the man back to the office and we sat down. We went into this record very thoroughly.

There was neglect; I can't explain these discrepancies, I don't know how they can be explained, except for the simple and possible reason that this boy was a minor at the time of the occurrences which are related in this record.

In the Board of Special Inquiry hearing this boy testified that he does not recall ever moving from Macao to Quei Yang. That was when he was approximately eight and a half, possibly nine years of age. He lived in Quei Yang from the time of the death of his mother until the father went to China for the [142] specific purpose of bringing him back to the United States, and he remained in China until about 1950, at which time he was finally

successful in securing a documentation from the American Consulate General in Hong Kong.

Yes, there are a number of discrepancies. We are not denying them. From the original record. They are admitted in the interrogatories. This boy has told me he doesn't definitely remember, but I have read him the record and I have told him that the record indicates such and such and I believe that under those circumstances there is no reason that he—to doubt the authenticity of the record statements.

I stated to your Honor that in this particular case this father was present in China at the time of the birth of this individual. Likewise his prior landed, older brother, who has testified as a witness, Chow Sam, was present at that time. The father was present in China, not only at the time of the birth of this individual, but was present in China for a number of years subsequent to that time, until the early part of 1939, at which time this boy would have been approximately four and a half years of age. Subsequent to the father's return to the United States he went back to China and brought to the United States these two prior landed sons, and he was in China at that time for a period of approximately one year in order to obtain documentation. During that time, likewise, he saw this boy in China. He had an opportunity to view this boy from [143] the time of his birth until he was approximately four and a half years of age, and then again he saw him at the time he was five, he saw him from the time he was five until he was six.

We have introduced here as an exhibit a small picture of a boy and a girl which was taken some time subsequent to the father's return to the United States. The picture of that boy has been identified as the same boy who he last saw in China before his return to the United States. Then the father returns to China in the latter part of 1946, December, to be exact. He immediately goes to a far distant place and brings this boy down to a locality close in proximity to an American Consulate and then he attempts to bring him to the United States.

The Government has referred to it in one of their cases, where the man prepared an affidavit, made the trips specifically for the purpose of bringing this boy to the United States. Then he lived with this boy during all the intervening years while he was waiting for documentation by the American Consulate. Fortunately we have a picture taken in 1947, taken at a time of the marriage of this So Tak to a Chinese citizen. Now looking at that picture, at that time, that picture being taken in 1947, the passport indicates the man returned to the United States in 1947, he returned with his wife, and naturally the picture must have been taken in very close proximity to the [144] date of his return, so that would place it in about July or August of 1947. At that time this boy should have been 13 years of age. You look at that picture of that boy and he looks and appears immature, for the age claimed. Naturally we had devastation, lack of proper food, malnutrition and a number of other circumstances that took place in China during the

intervening years. But you look at that picture taken in 1947 and you look back at the picture which was taken just subsequent to the father's return to the United States in 1940, and there is no doubt that they are one and the same individual.

Now prior to returning to the United States after securing documentation from the American Consulate, the father had another family picture taken, which has been introduced into the record. This picture likewise shows the father with the boy and with the stepmother. I state that if we look at the pictures that were taken in 1950, look at the picture taken in 1947, the picture which probably was taken in the latter part of 1950, or the early part of 1951, we will see a picture of one and the same boy. And if we look at the boy who was here and who has testified before this Court today, we will see that he is the same individual as the person whose pictures have been introduced as evidence in his behalf.

We have a statement of the father that this boy was actually born of his wife, and that he was present at that time. We have the statement of a prior landed son, and I don't [145] care whether he was admitted on an appeal or otherwise, but it is a concession by the proper administrative authority that he was a citizen of the United States and that he acquired such citizenship based upon his relationship to Chow Yit Quong, who is an admitted United States citizen.

Now Chow Sam has stated that he was likewise in China at the time of the birth of this boy, that this boy was born of his mother, that Chow Yit

Quong is the father and that the boy lived with them in the same house, slept with them in the same house, had meals with them in the same house in China from the time of his birth until the time of Chow Sam's departure to the United States in about 1940. He has stated that the picture of this boy, which appears on Exhibit No. 1—or Exhibit No. 2, pardon me—is the same boy that he last saw in his own home in China prior to his departure to the United States in 1940; and naturally the other pictures, when taken into consideration with this Exhibit No. 2, show the same boy appearing throughout as a member of this family.

The tax returns which we have submitted show that this father has consistently stated that he has had a boy named Chow Seng. There is no evidence introduced on the part of the Government to overcome the claims of the plaintiff in this case. All of the Government evidence has been admitted for the purpose of impeachment of the witness Chow Seng. Impeachment of what? Impeachment of his testimony given concerning [146] facts which took place during his early minority. Occurrences which would be frightening to the ordinary minor child. The record shows that this boy was approximately eight and a half to eight years and eight months of age at the time of the death of his mother. And I know of personal experience that you do not recall all of the circumstances arising from such a situation when you are of that age. My mother passed away when I was nine, and I couldn't tell you any more about it than this boy. I couldn't

definitely tell you what transpired for a considerable number of years prior to that time. I couldn't tell you what transpired for at least two or three years subsequent to that time. The mental reaction of a minor child on losing two members of his family at the same time would naturally cause a mental block and he would not be able to testify concerning any facts that took place during that time.

As to the occurrences which took place subsequent to this father's return to China in 1946, the only explanation that I can find as to those discrepancies is that this boy, who was then approximately 12 years of age, or 12 and a half years of age, was so excited from moving from Quei Yung, which is way up in the mountains—it is a considerable distance, five days traveling distance from the Canton area—coming from there down to Hong Kong, to Canton, to the village, back to Canton, attending a feast in the village, knowing all about the marriage of his father, hearing all about the marriage of [147] his father, living together with the father and with the stepmother for a considerable number of years after that, and at the same time, within a few months attending a wedding of another individual, a witness who appeared here, So Tak, going to his feast, seeing his wedding, and a boy of that age could become so confused over the facts that he could not readily identify them as to whether they were coming from his own knowledge or whether they were facts which were placed in his knowledge by other individuals.

I state, your Honor, in this case that I am so well satisfied of the relationship, in this particular case,

that this boy is a bona fide, lawful blood son of Chow Yit Quong, I think it is one of the best cases that I have ever seen. I know that the discrepancies may indicate otherwise, but I believe if the Court would take a look at these individuals, as your Honor did yesterday, and would take a look at this father and take a look at this boy, that you would see such a similarity that, coupled with the testimony of this record, that it would be impossible to do other than enter judgment for the plaintiff.

Mr. Hargreaves: If the Court please, I am afraid that I do not quite agree with counsel that this is one of the best cases that he has ever seen. I have seen many better cases, hundreds of them, admitted over at the Immigration Service, and I have seen many other cases such as these which were [148] denied. He is satisfied that it is a bona fide case. I am not. I have seen this pattern time and time again with the same result. I would like to remind the Court once more of those presumptions which I mentioned at the beginning, the presumptions of alienage, a presumption that the Ninth Circuit says the person himself is an exhibit, his speech, his manner. The Court observed him on the stand. He appears to be Chinese, not American. And he must overcome that presumption by strong, clear evidence.

Counsel takes exception to my statement that he was a naturalized citizen. Those were the words of the Supreme Court. However, if counsel prefers, we might say that he was, if a citizen at all, a citi-

zen whose citizenship was a grant of Congress. He is not born. He admits that he was born in a foreign country and therefore he must be presumed to be an alien.

Counsel has also called attention to the Nationality Act, which states that there are only two types of citizens, those born in the United States, or those, rather, that are native born, who acquire citizenship at birth, and those who are naturalized. However, that Nationality Act was passed long after the alleged birth of the plaintiff, and in addition, it cannot change the Constitution.

Speaking of the testimony, the document which was presented, counsel has laid great stress on Exhibit No. 2, [149] which is a photograph of a small boy and a small girl. Now personally I cannot identify who these persons are, and I don't believe that the Court can. It is just a picture of a small boy. Now if we assume that it is the plaintiff, there is no connection between this photograph and his alleged father. It doesn't prove anything. We don't know who this girl is. And that is the only evidence which goes back beyond the time when he first attempted to make arrangements to come to the United States. Since that photograph, or since the time of his application, we have nothing. I mean, your Honor, that prior to the time of his application we have nothing in the way of documents—only this picture, which doesn't connect him in the least manner with his father or his alleged father.

I believe this case has demonstrated the wisdom

of the Court in the case of *Suey Sei vs. Nagle*, 295 Fed 675, where the Court stated:

“Experience has demonstrated that testimony of the parties at interest as to the mere fact of relationship cannot be safely respected or relied upon.”

When we boil down the testimony of the plaintiff and his alleged father, we come to this. We have a statement, “This is my son”; “This is my father.” Hardly anything more. They have described some of the circumstances. However, generally speaking, they are in disagreement as to family [150] relationships where the mother died, where she was buried, the sleeping arrangements in the village, how large the village was, the residence in *Quei Yung City*—all these things they are in disagreement on, where there is no possible excuse.

Counsel presented two witnesses, *So Tak* and *Chow Sam*. *So Tak* was in China after the application had been made for the petitioner to come to the United States. He actually has not knowledge of the family. He was in *Canton City*, he saw him there. If we accept his testimony as true, he has added little to the case.

The testimony of *Chow Sam* is that of a party in interest. He also alleges to be the son of *Chow Yit Quong* and he must assume—we must assume he is under the control and has a self-interest in this matter. He has stated before the Court that neither himself nor his alleged brother, *Chow Hing*, resided with his father after the first couple of years in the United States. This does not tend to show the usual family relationship. If I have a son, I

will have him living at home. I won't have him go to a Chinese home or have him go live by himself in some strange place in San Francisco.

I submit, your Honor, that actually we have a total lack of substantive evidence—either documentary or by witness.

With the permission of the Court, I would like to stray for a moment from this particular case and show the general and usual pattern of fraud cases. The Immigration Service has [151] been dealing with this problem for many years. It is not one that is brought to the attention of the public. However, it is a known fact that the American, that is, we might say so-called Americans who go to China, purchase their wives, purchase sons or servants, and that those people are actually no more than slaves. Now that violates all our American ideas. It is against the principles of the United States to sell people, and yet that is what happens in China today. Now if a person will go to China and do such an act, his credibility as a witness in an American court certainly should be scrutinized very carefully. I don't say that the father went to China and purchased his second wife; if I ask him, he wouldn't admit it anyway.

However, experience has shown that the great portion of these cases, that is what happens. It is a barter and trade deal. An example is a witness in this case, So Tak. He went to China, made arrangements in a few days to have a wife. Generally they don't even see the woman before they marry her. A practical example of this very thing will be

brought to the attention of the Court in January when we have a case coming on for trial where a would-be husband sent the money to China to purchase a wife. He then purchased a record, a fraud record, to bring her over. That has cost that man a total of approximately \$12,000 and he still hasn't got his wife.

We have spoken of the large claim of nine sons and one [152] daughter. Many times I have heard it said, well, even if we said that the father has made a false claim, that doesn't mean that this boy, this particular plaintiff, is fraudulent. It's always this one that is good. Now I don't know if this man has nine sons. Personally I don't believe he has. However, how can the Government or the Court sort out the wheat from the chaff, tell which are good, which are bad? It is impossible. All the evidence is locked over in Red China behind the Iron Curtain. We can't investigate. The only thing we can do is question them when they come.

Returning to the evidence, the plaintiff must prove that he is not only the son of Chow Yit Quong but the legal blood son. So far, there is no documentary evidence whatsoever to show a marriage. Going back to the fundamentals, where is any proof of the marriage between the alleged father and mother? All we have is the statement that, "I went to China and got married." If he is not the legitimate son, then he would take the nationality of the mother and not the nationality of the father, or be a United States citizen.

Counsel made a number of statements regarding

the V.S.I. hearing. The Court will notice that in that hearing a specific request was made not only to the plaintiff but to his guardian for any documents, photographs, letters, anything they might have to substantiate their claim. They stated they didn't have any, and they specifically requested that the record be [153] submitted on the evidence they had presented, only their testimony. I might mention also that it seems strange that counsel would bring forward one brother but not the other. Where is Chow Hing?

In closing, I would like to thank the Court for its consideration. This is my first case, I know I have made numerous errors. However, the Court has been very patient. Thank you.

Mr. Hertogs: I will be rather brief on the closing argument, your Honor, but one of the first points I would like to cover is that quotation of Mr. Hargreaves concerning the presumptions. Now the presumptions, and all the court cases which have been cited there, arose out of the old Chinese Exclusion Act, and the old Chinese Exclusion Act specifically had a section in it which stated that the burden of proof was on any Chinese. All Chinese were to be presumed to be aliens until the contrary was shown. And that was originally brought out in the old case of Wong Kim Ark and a few of the other old cases; even though they resided in the United States for a considerable number of years, the burden of proof did not follow the ordinary burden of proof in a court in a legal matter, but followed according to the specific statute.

However, the Chinese Exclusion Acts were repealed in 1943. Naturally, until the Chinese Exclusion Acts were repealed in 1943, it was absolutely impossible for a United [154] States citizen, such as Chow Yit Quong in this particular case, to bring his wife to the United States. The laws of the United States at that time did not provide for the admission of the lawful spouses of the United States citizens who were of Chinese race. They were limited solely to the allocation of 100 a year, which was a very small number in comparison with the number of United States citizens who were residing in the United States.

It was not until an amendment was passed subsequent to the repeal of the Chinese Exclusion Acts in 1943 that the wives of United States citizens of Chinese ancestry were granted the right to bring their wives to the United States as non-quota immigrants, the same as those of any other nationality.

Now counsel has referred to this buying and selling of wives in China.

The Court: The law as it is now, under the present law, is that the guardian here, Chow Yit Quong, could bring his wife over?

Mr. Hertogs: Oh, yes, he is trying to, your Honor. We are just trying to get—we have a number of these cases. We are confronted with a rather difficult situation on these cases at the present time; the same as counsel has referred to in his argument. Any of these persons who were not successful in getting out from communist China prior to [155] its occupation in 1949 have had to secure exit per-

mits since that time in order to leave, and in order to secure permission to even leave that area and go to Hong Kong. Now it happens that in a number of cases, the Government has refused to issue such permits if the persons owned property in China and unless they would surrender that property and pay a large sum of money for the release of these individuals.

The Court: When did the statute become effective under which the——

Mr. Hertogs: 1946, your Honor—December of 1946. I think it was December 18th, wasn't it, 1946? I think it was that, December 18th, 1946. And since that time most of them have been bringing the wives, and I might state that there are any number of hundreds—I mean hundreds of these visa petitioners whose petitions have been approved by the Immigration and Naturalization Service that are awaiting for processing in the American Consulate in Hong Kong. I might state that from our own office we have had cases which were approved by the Immigration and Naturalization Service as early as April of 1952 and who have not even had an opportunity to secure documentation as of this date.

Now this buying and selling of wives in China has been going on, we admit, for a number of years; but it is not a question that is involved in this particular case—it is a practice which has been adopted, legally recognized over in [156] China for many, many hundreds of years. Centuries. They have found that it works out rather well. As a

matter of fact, they don't have that large divorce rate like we have here in the United States.

Now concerning the marriage of Chow Yit Quong, the question concerning the marriage would have been determined by the Immigration and Naturalization Service at the time of the admission of the two other boys in 1940. It must have been a determination at that time, and there was no question raised by the Board of Special Inquiry at that time. It certainly definitely was not raised by the Secretary of Labor on appeal, that Chow Yit Quong was legally married in China to a person named Wong Suey Hong and that those two boys were the lawful sons of that marriage.

The Court: Well, since this is a *de novo* proceeding, I suppose to be fair about it, the Court should not consider anything one way or another that was done by the administrative proceeding.

Mr. Hertogs: That is the view I was going to express just now, your Honor. I had some of my citations out here on that very particular thing. This is a hearing *de novo*.

The Court: In other words, the plaintiff coming in would have to make his proof and nothing that the immigration authorities did that was favorable to him would be admissible, any more than on behalf of the Government, anything that the [157] immigration officials did that was unfavorable to him should be admitted.

Mr. Hertogs: Other than in this particular case, you have the testimony of a prior landed son that his mother was so forth and so on, and that—the

stipulation of counsel that this boy was admitted to the United States as his lawful son.

The Court: The Court has to rule on that question on the record before the Court.

Mr. Hertogs: That is true. Now calling the Court's attention to the burden of proof, I cite the case of *ex parte Delaney*, which I know the Court is very familiar with, 77 Fed. Sup. 312 at page 322, which was affirmed by our Ninth Circuit, 170 Fed. 2nd 239. The Court stated in that case that the appellant had the duty of establishing the essential facts by a fair preponderance of the evidence. Likewise the Court of Appeals here for the Ninth Circuit stated in the case of *Gum Yu vs. Nagle*, 34 Fed. 2nd 848, at page 851:

“Questions in the cases of applicants who claim citizenship by reason of being sons or daughters of American citizens is a question of paternity.”

And the Court likewise stated in *Kwan Tung Jung vs. Bonham*, 119 Fed. 2nd 915, at 916:

“That relationship is the sole issue.” [158]

And there are many other cases which hold the same way, and the same view, that it is a question of paternity or the question of relationship.

Now in the *Gum Yu* case, Judge Wilbur, at page 852, stated:

“Relationship is not usually proven by physical facts and never is where the mother does not testify. But by pedigree, reputation in the family and by the conduct of the parties,

including the manner in which they lived, the fact that a small child lives in the home of its alleged parent and that they maintain towards each other the obligation involved in the relationship, is evidence favorable to the issue; and the evidence that they did not live together and did not conduct themselves as parent and child is evidence to the contrary.”

And he goes on and says:

“Such evidence is not collateral evidence; it is direct and material evidence on the issue.”

The Court of Appeals likewise for the Ninth Circuit stated in the case of *Lee Him vs. United States*, 74 Fed. 2nd 172, at page 173, citing another Circuit Court case:

“He took the stand and testified to his own belief concerning his place of birth. This evidence, of course, was hearsay; but nevertheless, it is the type of hearsay which is [159] admitted.”

And the same view was also expressed in the *De-laney* case and likewise in *United States vs. Wong Gung*, 70 Fed. 2nd 107.

The Court: Well, there isn't very much doubt as to the admissibility of evidence, but I don't think there is any judge in any Appellate Court any place whose words would mean very much to me on the question of the weight to be given to the testimony in cases of this kind, because I think no Appellate judge is competent to give any advice on that ques-

tion unless he comes down and hears some of these cases.

Mr. Hertogs: That is true, your Honor. That is solely a question for the trial judge, of the weight to be given the evidence.

The Court: That is a problem.

Mr. Hertogs: It is a difficult problem.

The Court: Mr. Hertogs, that is a problem that I don't think anybody in the Appellate Court has any realization of, or anyone in the Supreme Courts; and I don't think that when this statute was passed, it said that a child born abroad to an American father became an American citizen by birth, that Congress had any idea that under that statute and under 503 of the Nationality Act, that the courts were going to be confronted with these cases that are indigenous to the Chinese, to China. That is, cases that have a peculiar setting, as they have no place else.

Mr. Hertogs: Now, I have to state, however, the courts [160] have decided adversely to the Court's contention, but it may possibly be that Congress did not realize that there would be the number of cases involved.

The Court: Well, I think it is not only the number of cases involved, but I think that no legislator had the picture that is peculiar to these cases—I guess most of them are here on the west coast—that arise out of the circumstance of an American male citizen of Chinese ancestry, following the course of making these periodic trips back to China and propagating there, and then at a subsequent

time seem to bring in male children—mostly male children, although some female children—upon the theory that they are the legitimate offspring of American citizen fathers. And then to require the courts to evaluate the testimony, when it has none of the opportunities that are traditionally afforded to a trial court to properly appraise testimony. It is given—the testimony is given by every witness in one or another of the Chinese dialects, there are no cases in which there is anybody that speaks the English language or has any of the indicia of Americanism——

Mr. Hertogs: Well, you just haven't run across some, your Honor. I have plenty of them.

The Court: Well, that may be so. I haven't seen any of them.

Mr. Hertogs: You will have one next [161] week.

The Court: Well, maybe so, but where there is some opportunity to more adequately appraise the testimony, then the Court's problem isn't so great. But certainly in this case and in the case which I heard somewhat recently in which Mr. Gale was counsel, there just is no possibility of the Court using the judicial microscope at all, because there is nothing that the Court can see. I can't tell what witness is telling the truth, whether a witness is; although sometimes I can't tell that in cases where English is spoken. I am not meaning to imply that there is any God-like quality that the Court has that can always discern what is the truth or not, but all I am endeavoring to say is that there is

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great difficulty in trying to discern the truth under these circumstances.

Now I think that you are right, Mr. Hertogs, in saying that it is wholly a question of paternity, and the argument is sometimes made that, well, if the Court denies relief to the plaintiff, then it is determining that the child who here seeks declaration of citizenship is not the son of the man who claims that he is his son. And that the court is thereby making some sort of a Solomon-like judgment as to paternity, and that it denies relief, that it is breaking up the family, taking the father away from the son because of the requirements that the son has to be deported if he doesn't succeed in his declaration. I don't think that that is too correct an appraisal of the situation. All the Court can determine is [162] whether or not there is sufficient evidence presented to warrant the granting of relief, and it may well be that even if relief were denied, that the child is still the son of the father who claims it is his son. The difficulty of proof is not the court's making, nor is the difficulty of proof the result of anything, perhaps, that even the parties, or the plaintiff, is responsible for. It lies inherent in the peculiar circumstances surrounding the appropriation of the issue in these cases, for which no one can be responsible. You heard me ask a rather facetious question—well, why don't they marry some of these Chinese gals here, why do they have to go all the way back to China on these periodic visits? That is not their home, they

say it is not their home anymore. Their home is here in this country. Yet——

Mr. Hertogs: That is easy enough.

The Court: And they conduct themselves in the way that is normal—why don't they conduct themselves in that way, which we understand here in America, where we lay so much emphasis on the home as the unit of our system of society. This is a foreign ideology here that we are confronted with. It is a different kind of thing. We are not accustomed to it. The ordinary American citizen doesn't go over to Bulgaria or Rumania or Japan or China or Canada and pay periodic visits over there and appropriate—and then come back to this country and keep on making a business of doing that. That [163] is a foreign idea, it is not in accordance with our type of thinking. We just don't think that way over in this country and that is why it is very difficult, I think, for a judge to put a sort of stamp of approval on this sort of thing, to grind American citizens through the mill in that kind of a machinery. They don't think along those lines.

Mr. Hertogs: Well, I think the Court is misinformed there as to the reasons. I hate to take exception to the Court's statement——

The Court: You go ahead. Do as you mind. I am just very informally——

Mr. Hertogs: Well, I knew that.

The Court: ——discussing the case with you, and you don't have to be afraid about saying what are your views in the matter at all.

Mr. Hertogs: No. Well, I would say this, your

Honor. My views on this proposition do not agree with the Court's. I think the family to the Chinese is considerably more important, and a home to the Chinese is considerably more important than they are to the ordinary American citizen. Now the Court wonders why it is necessary for them to go to China. If the Court would look back over the picture, going way back to 1880 at about that time, at which time the railroads brought to the United States thousands and thousands of Chinese laborers to the United States, they were all of male [164] sex. Then the Chinese Exclusion Laws became effective in 1882. That barred from admission to the United States those of Chinese race. Subsequent to that time they were supposed to have been born in the United States, and I use the words "supposed to have been born in the United States." I don't know how many thousands of male persons, and the records of the Immigration and Naturalization Service clearly indicate that there was such a small number of Chinese women in the United States before 1900, that it would have been a physical impossibility for more than possibly five per cent, maybe possibly ten per cent of these individuals to have been actually physically born within the United States.

Now up until very recently, and the overruling by the Supreme Court of these laws, you had laws, not only in California but practically all of the other states against miscegenous marriages. Now you had all these males in the United States. You did finally secure, up to 1924—before 1924, for a

number of years in there, a very limited number of years, I might state, it was possible if a Chinese had certain qualifications, that he could bring his wife to the United States. That was under a treaty of trade and commerce that we had between China and the United States, which provided that they could bring their families to the United States. And those who were engaged in foreign trade between the United States and China, and that is most of their import and export [165] business was from China, it was possible for them to meet those certain qualifications and they did bring their families to the United States and they did have children born in the United States. But that was a very, very small percentage, to the actual number of Chinese that we have had living in the United States. I would say it would be about one per cent. It might not even run as high as one per cent. Then we still have all of those males in the United States.

Now it was not until 1946 that they were able to bring the wives to the United States and establish their home in the United States, as we would, being American citizens.

The Court: Well, but, Mr. Hertogs, that was not precisely what I meant. Let's take the guardian here, Chow Yit Quong. Now he is an American citizen. He lives in the United States. He makes his living in the United States. He has, presumably, his home in the United States. All I have intended to point out to you was that it is foreign to the American idea that this man should make trips to China and beget children there when he is an Amer-

ican citizen living in the United States, if he claims the benefit of that American citizenship. Now if he is still Chinese and he still considers himself not an American citizen and a Chinese, then it is understandable why he should go back there. But otherwise, to me there is no justification for that under any circumstances, not if you want to be an American citizen. Now maybe I have got too high an ideal set [166] for myself in that regard, or perhaps I am trying to set too high an ideal.

Mr. Hertogs: I think——

The Court: That produces the great difficulty we have in these particular cases.

Mr. Hertogs: And which you won't have in five years from now.

The Court: It may be. We may not have them. When the time comes when the family life is maintained in the United States for the people of Chinese ancestry, we may—all these problems may be eliminated. But as they stand now, we have the situation where there is a man who claims American citizenship, he lives in the United States, he makes his living here, but he goes abroad to produce children. Why? He doesn't go abroad to make his home abroad; he goes abroad for the purpose of, as the witnesses have testified in this and other cases, resting and what was the other word? I may have a note of it. Rest and——

Mr. Hertogs: Visit the family.

The Court: Rest and visit. Now that is his purpose in going abroad. Not in connection with anything else. If he claims still to be an American

citizen. Now when offspring are produced under those circumstances, I believe that under the statute, the proof should be scrutinized with great care to see whether or not there is in reality the true evidence of [167] paternity. Now, unfortunately in this court I think the judges can't help being extremely cautious about these matters, because I think I mentioned it before here, you had a number of cases presented to the Court involving fraud in connection with Chinese paternity. I use the word "Chinese"; I mean those who are of Chinese ancestry. Therefore, with the language barrier, with the different types of thinking that is involved and with this background of other cases, I think the attorney who presents these cases must expect that the Court is going to proceed with great caution. I won't make a rubber stamp of myself simply because some words come out in a foreign language from a witness' mouth and I say that is sufficient and I stamp my name down and make him an American citizen. Maybe some other judge might feel that it is all right to do that, but I find it very difficult in view of the experience the Court has had in these matters and in view of the other circumstances which I have just mentioned. It presents a problem of great difficulty.

Now, Mr. Hertogs, my feeling in the matter is, and it is just a sort of an intuitive feeling—I'm inclined to think that maybe this boy is the son.

Mr. Hertogs: I am sure of it, your Honor.

The Court: But I am not so sure about the evidence in connection with the matter, and I am not

here to guess and conjecture. It may be that he is. There is some slight resemblance. But I don't profess to be an authority on that, [168] and I can't tell. If it were the case of persons who spoke the English language and they were situated as these two were, and I had them up here and I had a chance to converse with them together and the three of us were talking together, then the relationship might become more evident. But there is great difficulty in that.

Mr. Hertogs: Well, I might state this, your Honor: Two things have appeared that I want to answer. First, the Court wonders why they go to China. I think that is the main thing—why. I think a study of the Chinese race would indicate the family is one of the most important things that they have, and I think our interpreter here and the official Government interpreter will probably agree with me on that. Now, why is it necessary for them to go to China? The reason that it was necessary for them to go to China is the fact they can't find a woman in the United States to marry. And they can't bring the woman in China to the United States, and naturally she must remain in China and they are confronted with that problem. Yet they must have a family, according to Chinese custom. And what has caused some of this in the past is the fact that it is very bad for a Chinese not to have a son. Ordinarily that is where we are confronted with a number of problems in these cases. Chinese custom requires them to have a son. If they don't have a son, they get a son.

The Court: Somehow. [169]

Mr. Hertogs: They get a son one way or the other, and he put in the family and he takes his position in the family as if he were a legitimate son, because that is one of the most important things in their way of life. And I think it is true likewise with the American people. I think we are becoming more of a family here in the United States. I have noticed that here recently—not referring to myself, but I think the families are getting a little larger. I just had a new addition, our fifth son. No daughters, either. And I think the families here are getting larger at the present time, and I think it is held true in China over a number of years. And I might state in this particular case, I still feel that I am satisfied, myself, personally, that this is a bona fide father and son relationship.

The Court: Well, I will take the case under advisement. You didn't intend to have the record typed in this case, did you?

Mr. Hargreaves: I had no intention of doing it, sir, unless you request it, your Honor.

The Court: Well, I think I have got a pretty clear recollection of the testimony in the matter. It is more of a fundamental problem of the nature and weight of the evidence, more than anything else.

Mr. Hertogs: Yes.

The Court: And I wish that someone with more qualifications [170] than some of the judges here, were able to fathom out these things. It is rather difficult.

I will mark this case submitted. I have another case that is generally similar, although, of course, the facts are not the same, and that is the case that Mr. Gale had, and I have that under submission. I will try to decide both cases reasonably soon.

Mr. Hertogs: Thank you, your Honor.

Mr. Hargreaves: Thank you, your Honor.

[Endorsed]: Filed March 10, 1953. [171]

[Title of District Court and Cause.]

CERTIFICATE OF CLERK TO TRANSCRIPT
OF RECORD ON APPEAL

I, C. W. Calbreath, Clerk of the United States District Court for the Northern District of California, do hereby certify that the foregoing and accompanying documents and exhibits, listed below, are the originals filed in the above-entitled case and that they constitute the record on appeal herein as designated by the attorneys for the respective parties:

Petition for declaratory judgment.

Answer.

Order substituting James P. McGranery as party defendant.

Interrogatories to adverse party.

Answers to certain interrogatories filed November 26, 1952.

Answers to certain interrogatories filed December 5, 1952.

Order for judgment in favor of defendant.

Order substituting Herbert Brownell, Jr., as party defendant.

Findings of fact and conclusions of law.

Judgment.

Notice of appeal.

Appellant's designation of record on appeal.

Appellee's designation of record on appeal.

Reporter's transcript of December 8, 9, 1952.

Petitioner's Exhibits 1 to 8.

Defendant's Exhibits A, B and C.

In Witness Whereof I have hereunto set my hand and affixed the seal of said District Court this 10th day of March, 1953.

[Seal]

C. W. CALBREATH,
Clerk;

By /s/ C. M. TAYLOR,
Deputy Clerk.

[Title of District Court and Cause.]

AMENDED NOTICE OF APPEAL

Notice is hereby given this 26th day of March, 1953, that Chow Sing, by and through his Guardian ad Litem, Chow Yit Quong, hereby appeals to the United States Circuit Court of Appeals for the Ninth Circuit from the judgment of this Court entered on the 17th day of February, 1953, in favor

of the defendant and against the said Chow Sing, by his guardian ad litem, Chow Yit Quong, plaintiff.

JACKSON & HERTOGS,

Attorneys for Plaintiff;

By /s/ JOSEPH S. HERTOGS.

[Endorsed]: Filed March 26, 1953.

[Title of District Court and Cause.]

COST BOND ON APPEAL

Whereas, the above-named Appellant has appealed to the United States Court of Appeals for the Ninth Circuit from the Judgment entered against him in said action, in the United States District Court, in and for the Northern District of California, Southern Division.

Now, Therefore, in consideration of the premises, and of such appeal, the undersigned, Maryland Casualty Company, a corporation duly organized and existing under the laws of the State of Maryland, and duly authorized to transact a general surety business in the State of California, does undertake and promise on the part of the appellant, to secure the payment of costs if the appeal is dismissed, or the judgment affirmed, or such costs as the Appellate Court may award if the judgment is modified, not exceeding the sum of Two Hundred Fifty Dollars (\$250.00), to which amount it acknowledges itself bound.

It is expressly agreed by the Surety that in case of a breach of any condition hereof, the above-

entitled Court may, upon notice to the Surety of not less than ten (10) days proceed summarily in the above-entitled action in which this bond is given, to ascertain the amount which the Surety is bound to pay on account of such breach and render judgment therefor against the Surety and award execution therefor, all as provided by and in accordance with the intent and meaning of rule 34 of the Rule of Practice of the United States District Court in and for the Northern District of California.

In Witness Whereof, the corporate seal and name of the said Surety Company is hereto affixed and attested at San Francisco, California, by its duly authorized officer, this 2nd day of March, 1953.

[Seal] MARYLAND CASUALTY
COMPANY,

By /s/ ARTHUR J. CLEMENT, JR.,
Attorney-in-Fact.

The Premium on This Bond Is \$10.00 Per Annum.

[Endorsed]: Filed March 26, 1953.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK TO SUPPLEMENTAL TRANSCRIPT OF RECORD ON APPEAL

I, C. W. Calbreath, Clerk of the United States District Court for the Northern District of California, do hereby certify that the foregoing documents, listed below, are the originals filed in the

above-entitled case, and that they constitute a part of the record on appeal herein:

Amended notice of appeal, filed March 26, 1953.

Cost bond on appeal, filed March 26, 1953.

In Witness Whereof I have hereunto set my hand and affixed the seal of said District Court this 27th day of March, 1953.

[Seal]

C. W. CALBREATH,
Clerk;

By /s/ C. M. TAYLOR,
Deputy Clerk.

[Endorsed]: No. 13746. United States Court of Appeals for the Ninth Circuit. Chow Sing, by His Guardian ad Litem, Chow Yit Quong, Appellant, vs. Herbert Brownell, Jr., Attorney General of the United States, Appellee. Transcript of Record. Appeal from the United States District Court for the Northern District of California, Southern Division.

Filed March 10, 1953.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the
Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit

No. 13746

CHOW YIT QUONG, Guardian ad Litem, for
CHOW SING,

Appellant,

vs.

HERBERT BROWNELL, JR., Attorney General
of the United States,

Appellee.

STATEMENT OF POINTS ON WHICH AP-
PELLANT INTENDS TO RELY IN THE
APPEAL OF THE ABOVE-ENTITLED
MATTER

Comes Now Chow Yit Quong, Guardian ad Litem
for Chow Sing, by and through his attorney, Joseph
S. Hertogs, and files herein the Statement of Points
on which appellant intends to rely in the appeal of
the above-entitled matter:

I.

That the Findings of the District Court are
clearly erroneous.

II.

That the findings, conclusions and judgment of
the District Court are unsupported by the evidence
of record.

III.

That the findings, conclusion and judgment of the
District Court are contrary to the evidence of rec-
ord.

IV.

That the District Court erred in finding that the plaintiff-appellant did not have a claim to permanent residence within the Northern District of California or in the United States of America.

V.

That the District Court erred in concluding that the plaintiff-appellant, Chow Sing, is not a United States citizen.

/s/ JOSEPH S. HERTOGS,
Attorney for Appellant.

[Endorsed]: Filed March 20, 1953.

[Title of Court of Appeals and Cause.]

DESIGNATION OF RECORD TO BE INCORPORATED IN TRANSCRIPT ON APPEAL

Chow Yit Quong, guardian ad Litem for Chow Sing, appellant in the above-entitled matter, by and through his attorney, Joseph S. Hertogs (in accordance with Rule 75(a) of the Federal Rules of Civil Procedure), hereby designates the following to be included in the transcript on the pending appeal from a judgment made, filed and entered in said matter on February 18, 1953:

1. Petition for Declaratory Judgment under Section 503 of the Nationality Act of 1940.
2. Defendant's answer.

3. Interrogatories to Adverse Party filed November 12, 1952.
4. Answers to Interrogatories filed November 26, 1952, and December 5, 1952.
5. Order for Judgment.
6. Findings of Fact and Conclusions of Law.
7. Judgment.
8. Order Substituting Party Defendant.
9. Reporter's transcript of December 8 and December 9, 1952.
10. Notice of Appeal.
11. Stipulation and order that exhibits may be considered in their original form without printing.
12. Statements of points on which appellant intends to rely on appeal in the above-entitled matter.
13. This designation.

/s/ JOSEPH S. HERTOGS,
Attorney for Appellant.

[Endorsed]: Filed March 20, 1953.

[Title of Court of Appeals and Cause.]

STIPULATION AND ORDER

It is hereby stipulated by and between counsel for appellant and counsel for appellee that all exhibits introduced at the time of trial of the above-entitled matter may be considered in their original form without printing.

/s/ JOSEPH S. HERTOGS,
Attorney for Appellant.

/s/ CHAUNCEY TRAMUTOLO,
United States Attorney;

/s/ CHARLES ELMER COLLETT,
Assistant U. S. Attorney,
Attorneys for Appellee.

/s/ WILLIAM DENMAN,

/s/ WM. HEALY,

/s/ HOMER BONE,

Judges of the United States Court of Appeals for
the Ninth Circuit.

[Endorsed]: Filed March 23, 1953.

No. 13746

United States
Court of Appeals
For the Ninth Circuit.

CHOW SING, by His Guardian Ad Litem, Chow
Yit Quong,

Appellant,

vs.

HERBERT BROWNELL, JR., as Attorney Gen-
eral of the United States,

Appellee.

Transcript of Record
In Two Volumes

Volume II
(Pages 189 to 240)

Appeal from the United States District Court for the
Northern District of California,
Central Division.

FILED

OCT 29 1955

No. 13746

**United States
Court of Appeals**
For the Ninth Circuit.

CHOW SING, by His Guardian Ad Litem, Chow
Yit Quong,

Appellant,

vs.

HERBERT BROWNELL, JR., as Attorney Gen-
eral of the United States,

Appellee.

Transcript of Record
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**Appeal from the United States District Court for the
Northern District of California,
Central Division.**

United States Court of Appeals
for the Ninth Circuit

No. 13746

CHOW SING, by His Guardian Ad Litem, CHOW
YIT QUONG,

vs.

HERBERT BROWNELL, JR., as Attorney Gen-
eral of the United States.

MANDATE

United States of America—ss.

The President of the United States of America
To the Honorable, the Judges of the United States
District Court for the Northern District of
California, Southern Division, Greeting:

Whereas, lately in the United States District
Court for the Northern District of California,
Southern Division, before you or some of you, in a
cause between Chow Yet Quong, as Guardian Ad
Litem for Chow Sing, plaintiff, and James P. Mc-
Granery, Attorney General of the United States,
defendant, No. 30820, a Judgment was entered on
the 17th day of February, 1953, which said Judg-
ment is of record and fully set out in the office of
the clerk of the said District Court, to which rec-
ord reference is hereby made and the same is hereby
expressly made a part hereof;

And Whereas, the said plaintiff appealed to this

court as by the inspection of the transcript of the record of the said District Court, which was brought into the United States Court of Appeals for the Ninth Circuit by virtue of an appeal agreeably to the Act of Congress, in such cases made and provided, fully and at large appears.

And Whereas, on the 16th day of July, in the year of our Lord, one thousand nine hundred and fifty-five, the said cause came on to be heard before the said United States Court of Appeals for the Ninth Circuit, on the said transcript of record, and was duly submitted:

On Consideration Whereof, It is now here ordered and adjudged by this court that the judgment of the said District Court in this cause be, and hereby is vacated, and that this cause be, and hereby is, remanded to the said District Court to make findings as to whether Chow Yit Quong was Chow Sing's father, such findings to be made in the light of the opinion of this court, and thereupon enter such judgment as may be proper.

You, Therefore, Are Hereby Commanded that such proceedings be had in said cause, in conformity with the opinion and judgment of this court, as according to right and justice, and the laws of the United States, ought to be had, the said appeal notwithstanding.

Witness the Honorable Earl Warren, Chief Justice of the United States, the twenty-first day of

February, in the year of our Lord one thousand nine hundred and fifty-five.

/s/ PAUL P. O'BRIEN,

Clerk, U. S. Court of Appeals
for the Ninth Circuit.

[Endorsed]: Filed February 23, 1955.

In the United States District Court for the North-
ern District of California, Southern Division

No. 30820

CHOW YIT QUONG, Guardian Ad Litem for
CHOW SING,

Plaintiff,

vs.

HERBERT BROWNELL, JR., Attorney General
of the United States,

Defendant.

FINDINGS UPON REMAND FROM THE COURT OF APPEALS

The judgment of this Court having been vacated and the cause remanded by the Court of Appeals with directions to make findings as to whether Chow Yit Quong was Sing's father, such findings to be made in the light of the opinion of the Court of Appeals,

Now, Therefore, for the reasons stated in the Supplemental Opinion of this Court in the case of

Ly Shew v. Acheson, No. 30159-31161, this day filed, the Court makes the following findings of fact and conclusions of law.

Findings of Fact

1. It is not true that the permanent residence and domicile of the person claiming to be plaintiff is within the Northern District of California or in the United States of America.

2. In substantial respects the evidence introduced by plaintiff was inconsistent and contradictory and therefore not credible. Consequently it is not accepted as true. The burden of proving his citizenship rested upon plaintiff. To sustain that burden plaintiff had to prove by preponderating evidence that Chow Yit Quong was his father. He may be, but plaintiff did not sustain the burden of showing it. Hence, for that reason, the court's finding is that Chow Yit Quong is not the father of plaintiff.

Conclusions of Law

The person appearing before the court as plaintiff in this action is not entitled to the relief prayed for.

Let judgment be entered accordingly.

Dated: March 31, 1955.

/s/ LOUIS E. GOODMAN,

United States District Judge.

[Endorsed]: Filed April 1, 1955.

In the United States District Court for the Northern District of California, Southern Division
Civil No. 30820

CHOW YIT QUONG, Guardian Ad Litem for
CHOW SING,

Plaintiff,

vs.

HERBERT BROWNELL, JR., Attorney General
of the United States,

Defendant.

JUDGMENT

The judgment of this court entered February 19, 1953, having been vacated and the cause remanded by the Court of Appeals, and the above-entitled court, Honorable Louis E. Goodman presiding, having on the 1st day of April, 1955, filed herein findings upon remand from the Court of Appeals, including findings of fact and conclusions of law, and having directed that judgment be entered in accordance therewith,

Now Therefore, It Is Hereby Ordered, Adjudged and Decreed:

1. That Chow Yit Quong is not the father of the plaintiff, Chow Sing.

2. That the relief sought by the plaintiff Chow Sing by his guardian Chow Yit Quong, is denied.

Dated April 5th, 1955.

/s/ LOUIS E. GOODMAN,

United States District Judge.

[Endorsed]: Filed April 5, 1955.

Entered April 6, 1955.

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice is hereby given this 1st day of June, 1955, that Chow Sing, by and through his Guardian Ad Litem, Chow Yit Quong, hereby appeals to the United States Court of Appeals for the Ninth Circuit from the judgment of this Court entered on the 6th day of April, 1955, in favor of the Defendant and against the Plaintiff.

JACKSON & HERTOGS,
Attorneys for Plaintiff.

By /s/ JOSEPH S. HERTOGS.

[Endorsed]: Filed June 1, 1955.

In the District Court of the United States for the
Northern District of California, Southern
Division

Before: Hon. Louis E. Goodman, Judge.

No. 30159

LY SHEW, as Guardian Ad Litem of LY MOON,
a Minor,

Plaintiff,

vs.

THE HONORABLE DEAN ACHESON, as Secre-
tary of State,

Defendant.

No. 31161

LY SHEW, as Guardian Ad Litem of LY SUE
NING, a Minor,

Plaintiff,

vs.

THE HONORABLE DEAN ACHESON, as Secre-
tary of State,

Defendant.

No. 30820

CHOW YIT QUONG, as Guardian Ad Litem of
CHOW SING,

Plaintiff,

vs.

HERBERT BROWNELL, JR., Attorney General
of the United States,

Defendant.

REPORTER'S TRANSCRIPT

Friday, March 11, 1955

Appearances:

For the Plaintiff Ly Shew,
STANLEY J. GALE, ESQ.

For the Plaintiff Chow Yit Quong,
JACKSON & HERTOGS, by
JOSEPH HERTOGS, ESQ.,
580 Washington Street,
San Francisco, California.

For the Defendant:
UNITED STATES ATTORNEY, by
C. ELMER COLLETT, ESQ.,
Asst. U. S. Attorney.

Proceedings

Mr. Collett: I notice, Your Honor, the mandate, after going up, came back; so if the Court wants at this time that it be spread on the minutes again for the Court's attention——

The Court: Yes, the mandate came back once before, and it is filed here, so I thought counsel ought to be given an opportunity to be heard on both sides as to what they think the Court should do on this mandate.

Then, in the meantime, apparently the mandate was recalled.

Mr. Collett: Yes, that is true.

The Court: Now it is back again.

Mr. Collett: Now it is back again.

Mr. Gale: Is there any question but what it is now properly before the Court?

Mr. Collett: No question.

The Court: Here is the new one, just filed.

Mr. Collett: That is right, yesterday.

The Court: Yes, the 10th day of March it was filed.

Mr. Collett: I thought it necessary to call Your Honor's attention that when Your Honor set this on the calendar for the previous mandate, that mandate was recalled, and the matter stood on the calendar and came back yesterday, so that what Your Honor set on the calendar under the mandate previously has been returned to the District Court. [3*]

The Court: Would you gentlemen like to go ahead? You have come from Sacramento?

Mr. Gale: Yes.

The Court: Would you like to go ahead?

Mr. Gale: Oh, I am here for the purpose of going ahead. It is before the Court.

The Court: All right. This mandate may be spread on the minutes of the Court.

I notice that it provides that the judgment is vacated and the cause is remanded with direction to make findings as to Ly Shew (reading mandate) and thereupon enter such judgment as may be proper.

Having in mind that mandate, I felt than rather take the record and make findings myself I ought to hear from counsel on both sides with respect to their views.

*Page numbering appearing at top of page of original Reporter's Transcript of Record.

Mr. Gale: Has Your Honor read the various opinions that have been rendered in this Court?

The Court: There have been a great many of them at different times. I have read the opinion upon which the order was made, the opinion signed by Judge Mathews and Judge Bone, as I understand it.

Mr. Gale: Well, originally, if the Court please, on August 18th, the matter was reversed with instructions to render judgment in favor of the petitioner. Then a petition for rehearing was filed. Upon the petition for rehearing it [4] was remanded for this Court to make findings in the light of the opinion. Then there have been subsequent opinions upon rehearings of the denials and opinions.

But, in any event, the matter is remanded to this Court for findings.

Now, the principal opinion of this court is based on this situation: If Your Honor will recall, in the exhaustive opinion that this Court prepared in the case the Court declared that the clear and convincing rule of evidence was applicable in these types of cases, and that you were denying the relief requested not because you were deciding that he was or was not the father of the children, which of course is the matter in issue, but because the evidence was not clear and convincing to this Court.

And according to Your Honor's opinion in that case, you said in your opinion,

“The Court does not find that the Plaintiff and his witnesses”—no.

“Since I find the evidence presented in this cause to be neither satisfactory nor clear and convincing, they have not sustained their burden of proof.”

Then you said:

“The Court does not find the Plaintiff and their witnesses are not telling the truth, but [5] rather, I cannot tell whether they are or not. Their evidence has neither the satisfactoriness or convincing character which justifies, in effect, conferring of American citizenship.”

Then you went on to say,

“It may well be that Ly Shew is the father of the two plaintiffs. In denying the relief asked for I am not saying that he is not their father. I am denying the petition because the evidence does not meet the proper standards.”

Well, that is where the upper court remanded the matter to this Court. The upper court, without going through the five opinions that have been written, it boils down to this:

The Court said, first, that the rule of clear and convincing evidence is not applicable in these cases, and all judges, despite the defense and concurring opinions, and so forth, said that, “However, it appears to the District Court’s opinion, from the District Court’s opinion, the District Court proceeded on the theory of the burden of proof resting on Moon and Ning was different from and heavier than ordinary burden of proof resting on plain-

tiffs in civil actions, a theory which was and is untenable. We hold that Moon and Ning's burden of proof was the ordinary one."

And all the opinions go on to say that we have to prove our case by a preponderance of the evidence. [6]

Then the opinions go on to say, however, it is for this Court to decide whether or not you are going to believe the witnesses or not, and the lightest opinion says although the evidence is uncontradicted, it is for this Court to decide whether or not to believe it.

So it is remanded to this Court for Your Honor, in effect, to be omnipotent, I might say, and decide is Ly Shew the father of the said children or not, and that is the decision this Court has to make, based on the theory that they are only required to sustain their burden by the ordinary burden of proof.

The Court: I think that is a fair statement.

Mr. Gale: That I think is the decision that is before this Court. So Your Honor is either going to say that Ly Moon is their father, or Ly Moon is not their father, and that is the case.

Mr. Collett: Your Honor, for just a comment, I think this matter presents as a thoughtful consideration the very interesting posture not only of the Judge of this Court but the American Consul in Hong Kong, in the first instance, and everyone who purportedly represents the United States along the way.

Your Honor, I think quite likely and honestly

recognizes the situation is presented in which a person comes forward and makes certain assertions and the burden is upon him in [7] order to establish it, and that burden is not sufficiently sustained in Your Honor's opinion. But you can't reach a black and white decision in which you can positively state that all possibility of a contention are excluded. He has simply not sustained his burden; therefore, Your Honor did not hold directly that the individual who made the claim is not the person that he claims to be, or that Ly Shew is not the father. You simply stated that there are shades of grey in this matter and that the burden so far as the contendants, the plaintiffs, was concerned, was not sufficiently sustained.

Now, although Your Honor used several words, and in the findings, the way it read, used somewhat similar words—The portion Mr. Gale quoted at page 45 of the transcript stated:

“I find the evidence presented in support of Plaintiff's cause neither satisfactory nor clear nor convincing.”

Apparently, if we extended the meaning of those words, what “satisfactory” would be, what “clear” would be, what “convincing,” that it was neither sufficient in the ordinary nor in the clear and convincing sense, that might be considered as such, depending upon what Your Honor had in mind.

That was your state of mind as you considered the evidence and endeavored to make your opinion, and the finding that was [8] founded upon that stated

that the evidence was not sufficiently clear to convince you.

I think Judge Roach in a later opinion used the same terminology and decided the other way, it wasn't of sufficient clarity to convince.

Now, using the statement of words, "of sufficient clarity to convince," to get to the imponderable problems of burdens of proof and the difference between going from a preponderance of the evidence to clear and convincing to beyond a reasonable doubt is a matter of degree, and a matter of degree that, how any particular individual might embrace it and how a decision might be related to it, that would of course be related to that person.

So Your Honor is in the position of purportedly reconsidering this evidence and stating that on the standard of proof which the Ninth Circuit says should be the ordinary standard of proof, whether the evidence satisfied that burden.

But in reaching your conclusion you can't resort to any shades of grey about the matter. You must come to the conclusion either he is he is not, and that constitutes a finality in the matter and doesn't leave anything in doubt. That's the way it seems to me, that the opinion has disposed of the particular question which is raised here. There isn't any room for the Court having any doubts about the matter. So far as the judgment is concerned, it must be either black [9] or white.

Mr. Gale: May I say one thing, Your Honor?

The Court: Certainly.

Mr. Gale: I presented this view to the Circuit Court and I think it is very applicable.

I think these cases are no more nor less than a paternity case. I don't know whether Your Honor has ever judged a paternity case in which a person claims to be the offspring of a certain person and claims either recognition or asks for support as a legitimate child or for support and we go through the ordinary trial.

No one usually is present at the actual act of conception. We have to follow the other methods of proof that are adduced.

I think it is entirely fair to say that Your Honor should look at this case just as though it were a paternity case and let's say, these children were seeking support from their father on the theory that he is responsible for their support, and not clouded by the fact that they are of Oriental extraction, that they are Chinese, just treat it as any other case, and have they shown enough, and particularly where their evidence was entirely uncontradicted. If it were that type of a case, would it warrant a judgment in their favor?

I think that is entirely applicable to these proceedings.

It's true the goal sought might be a little bit different, [10] it is citizenship, but it still boils down to the basic fact of is he their father or is he not their father, and have they convinced this court or haven't they.

It is a difficult decision the Court has to make, but that is what the upper court says you have to

do. You have to be a Solomon and say, are they or aren't they?

The Court: I am in doubt whether it is necessary to comply with this mandate of the Court of Appeal, because I don't think it is necessary for the Court to find whether or not Ly Shew is the father of Moon and Ning. Although the mandate says that, I think all the duty of the Court is to find out whether the evidence—make a finding on the evidence as to whether or not it is the children of him.

Mr. Gale: Well, here is the mandate of the court. It says, "The judgment is vacated and the causes are remanded with direction to make findings as to whether Ly Shew was the father of Moon and Ning, with such findings to be made in the light of this opinion."

The Court: I know it says that, but I am just wondering whether or not, supposing I were to hold that the preponderance of the evidence, or whatever standard it is that the Court of Appeals refers to as the "ordinary one," that by an ordinary standard the evidence is sufficient to show that Ly Shew was the father. I still wouldn't necessarily have to do anything more than to hold that the evidence so shows. [11]

Likewise, if I were to come to the conclusion that the evidence does not show that he is the father, then I make that finding. It isn't necessarily the result that I have to decide whether he is the father or not. I just simply decide that the evidence does not establish the fact or does establish the fact.

Mr. Collett: I think you are confronted with the judicial process at that point, if the Court please. You make that finding and then it follows as a conclusion of law that he is not. You don't actually become involved in that, but it follows as a conclusion of law that he is not.

The Court: I think—I don't need to be critical of the Appellate Court's decision because I have sat there in many cases myself. But I think that they make a mistake when they refer to that as—that's a conclusion of law which nullifies it. All the Court finds is the facts.

I may be getting rather technical myself over it, but I think, for instance, if I were to hold that by ordinary standard the evidence is not sufficient to show that Ly Shew is the father of these two young people, it doesn't follow that I have to make a finding of fact that he is not their father.

Mr. Collett: No. No. But you have run into the fact that this manner that is before the Court is an adversary proceeding, whereas it is ultimately a political matter that [12] has been processed through the administrative procedures and the person was either admitted or he was not admitted on the contention that was made and therefore it was subject to review.

But here it's projected into this Court as an adversary proceeding in which contentions are made and apparently controverted and must now be resolved in accordance with the ordinary judicial procedure, which means findings of fact are drawn and conclusions of law which resolve out the con-

tentions which are made. And the final conclusion is that he is not, and it is upon that basis that I think Your Honor must act. You can't leave it in a state of grey. You must come to the conclusion that having found that the burden of proof is not feigned, that as a conclusion of law you must find that the person is not.

It doesn't leave any leeway, and it almost follows from the premises established that you have to draw that conclusion. It doesn't become a matter of fact, it is a conclusion of law. It seems that that is the position that the matter would be left in on the opinion that has been written here, the mandate that comes down to this Court.

The Court: Well, I suppose I will have to wrestle with what kind of findings to make in this case.

Mr. Gale: Well, I think that Your Honor has to make the decision that either you will or will not grant the [13] relief prayed for.

The Court: Yes.

Mr. Gale: And from that point, either one of counsel, either Mr. Collett or myself, will submit findings which we feel applicable, and we can take that burden off the Court, and if the Court doesn't agree with us, you can revise the findings.

I think that is the decision this Court is going to make. I didn't want to argue the facts, and I think the facts are well before the Court.

But I think that certainly, Your Honor, as an ordinary adversary suit, nothing more, nothing less, measured by the ordinary standard of evidence, having the burden of proof and having proven our case

by a preponderance of the evidence and, as the Courts point out, without conflict and without any testimony to the contrary, that the petitioners——

The Court (Interposing): Well, Judge Roach just rendered a decision about a month ago in a case in which he squarely held that it doesn't make any difference whether there is any contradictory evidence or not. If there is only one witness testifies in favor of the plaintiff—I don't believe it was a citizenship case. I believe it was an immigration case.

Mr. Collett: It wasn't a 903 case, but it was a claim of citizenship. [14]

The Court: Was it?

Mr. Collett: Yes, it was.

The Court: In which he squarely held that since he didn't accept the testimony and didn't believe the testimony of the plaintiff, he decided against him irrespective of whether or not there was any contradiction to it by anybody.

Mr. Gale: Well, the Circuit Court points out in their opinion, Your Honor, that you are not bound to believe it. The original opinion says that, being uncontradicted, it must be accepted by the Court. The subsequent opinions point out that you are at liberty to believe or disbelieve the evidence, and that is for this Court to determine.

I merely suggest to this Court that measured by any ordinary standard, and by any case in which I have otherwise been involved, we have certainly, in my opinion, sustained our burden of proof. But that's for this Court to decide.

The Court: That is a problem, of course, I don't think any appellate court fully realizes, the difficulty of relating these cases to the ordinary standard of cases. And because of the difficulty of the Court in evaluating the testimony, that brought about my statement of the rule which I thought should be applied to this type of case.

It has nothing to do with whether they are Chinese or Mexicans or Greeks or anything else. I don't know why Judge Denman put that in his opinion. In the whole picture of the [15] case it is the great difficulty that every judge who has decided these cases has expressed, the great difficulty of appraising the testimony.

That is not the fault of the judge. It isn't the fault of the law. It isn't because the judge hasn't the mental mechanism to cope with it. It is just because of the peculiar nature and circumstances of this and other similar cases that presents a problem of the greatest difficulty.

And since we have in a great number of similar cases of a similar kind found that there has been fraud and chicanery and lying and everything else involved in them, we approach them with caution. It is because of the general circumstances of this and similar cases. It makes it difficult to appraise the testimony.

It's all done in a foreign language. And the difficulties involved in appraising the testimony given through interpreters, where rarely you have anyone who is able to speak firsthand as to the facts and speak our language. The difficulties involved in that,

the way the situs of the alleged birth of the individual is not accessible—not inaccessible any more because they are Chinese than that they are Greeks, but inaccessible because of the physical conditions existing. All those conditions make the problem a very difficult one.

I am not the only one that has had those problems. Other judges have written about it and have spoken about it and had [16] the problems in similar cases. So it isn't something that is just a figment of the imagination. It is a very difficult problem.

And the rule that I worked out in this case, and which the Appellate Court rather summarily dismissed—which, of course, was within the power of the reviewing judge to do—seemed to me to be one that fit the circumstances of the case. Other courts have devised special rules in all sorts of cases in order to weigh evidence where the problems presented were unique and circumstances were difficult.

So that is the reason why I came to that conclusion in this case. I just wasn't convinced by the evidence in this case that, in the shape it was in, that the evidence satisfied me that these two youngsters were the children of Ly Shew.

It is true I imposed a different standard of proof. That is, I suggested, declared according to my view, a different standard of proof. But the problem still remains just the same.

If I were to make a finding now that Ly Shew was the father—I say that in all fairness to counsel

for the Plaintiff—if I were to make a finding and I would be prepared to say so in a supplemental finding, if I were to make a finding now and find as a finding of fact that Ly Shew was the father of these two children, I would be making the [17] finding not of my own volition but under some command from another judge.

Now, if another judge who has the power to make a decision wants to make a decision to that effect, I have no quarrel with it, because another judge might decide it another way. But I don't see how I could in justice and in good conscience make a finding of fact because some other judge tells me I should make a finding of fact. It has no reason to it at all. There is no reason behind that at all.

If another judge wants to direct that judgment be entered, that's a different matter. It might be well within the power of the Court to do that.

I am merely speaking at random, gentlemen, pointing out that there is a problem of findings in the case, and that is why I thought I ought to have the view of counsel in the matter.

Mr. Gale: Your Honor, may I point this out: The words "clear and convincing" and "preponderance of the evidence" in themselves are not a mathematical formula. They only mean what they purport to mean to the particular judge who is considering the particular problem. You and I might have an entirely different, and probably do have an entirely different definition of what those mean, of what constitutes either "clear and convincing" or "preponderance of the evidence."

It isn't a mathematical formula like two and two make four. [18] It is that standard which happens to be applicable to the particular intellect or mental process that is considering that particular problem.

Now, Your Honor took a certain standard, a very high standard. Let's reach it here and say (demonstrating), "That is what I consider clear and convincing. The evidence just didn't reach that standard so I can't grant the relief prayed for."

Now, the higher court, as all agree—whether we agree with it or not, at least under our judicial system that is the higher court—they said, "No, Your Honor, drop your sights a little bit." That in effect is what they have said, "Drop your sights a little bit. Let's divorce this completely from the fact—if you can do it, let's divorce this completely from the fact that in other cases other persons of the same race have not told the truth, have committed fraud, have been guilty of various other offenses. Forget, if you can, the fact that the language comes to you in an interpreted form. Forget, if you can, some of the political situations that are now involving us. At that time and at the present time possibly we are involved in acts of war and aggression with people of the same race. Divorce that from your mind, if you can, and consider it just really on the basis of one case, Ly Shew and his two children."

Perhaps the Court can't do that. [19]

The Court: That's just the problem. You have stated it very adequately. It is a very difficult prob-

lem. I have great difficulty in knowing how to proceed.

Mr. Gale: Maybe if Your Honor——

The Court (Interposing): I have just as much difficulty in proceeding upon the theory of making a finding that he is the father as I have that he is not the father. The same difficulty that existed before exists. And I haven't been helped any by the Appellate Court. I mean, it doesn't make much difference about the standard.

Mr. Gale: It isn't the standard. It is what are you going to—You may take the standard of the preponderance of evidence, and in your mind the standard that you hold to be the preponderance of the evidence might be exactly the same standard that another judge might hold to be clear and convincing.

Do I make myself clear?

The Court: Yes.

Mr. Gale: In other words, no court can tell you, "We reach a certain mathematical equation and at that point we reach the preponderance of evidence, and then we add some more weight to the scales and then we reach the clear and convincing."

But I just have to venture this one observation, if I can. I think Your Honor in all fairness and as part of the [20] judicial process should attempt, so far as it falls within human ability and judicial ability to do so, to just merely consider this as one case, the case of Ly Shew and his two children, and not whether they are yellow or white or red, and just consider it as another case come into your court,

removed from the other 7 hundred 903 cases pending, removed from the fact that a war is going on, removed from the fact of fraud, and say it is an ordinary adversary case, which the Court said it was.

I think we are agreed Your Honor has to consider these things, because it is your mental processes that must be convinced. Mr. Collett and myself are never going to agree on it. Obviously we have different standards and for very different reasons.

Mr. Hertogs might have something to add to this thing. I know he has the same problem and a similar situation coming up.

Mr. Collett: If I may have a few more words on what counsel has said, it is all well and good to try and detach yourself and build up some hypothetical measuring rod in the case that supposedly indicates that up here is "clear and convincing" and down here is something else.

But here the fundamental premise upon which counsel would proceed is not fair. There isn't an adversary proceeding here because counsel was in the same position Your Honor was [21] in to begin with. He is in no position—and I am not looking at the manner in which the Court of Appeals avoided the same problem here that they purportedly met in Fong Wong Jing and the Seattle case.

The allegation in this cause is that for over four years last passed, "the said minor has presented sundry and various applications to the American Consul at the British Crown Colony of Hong Kong for permission to enter the United States as a citizen thereof and/or for the purpose of having his

claim for citizenship passed upon and adjudicated by the Immigration and Naturalization Service."

That was denied on information and belief.

Now, to begin with, the individual comes from nowhere, out of the obscurity of remote regions, unknown to the individual who represents the Secretary of State, and says, "I want some documentation to go to the United States. I want to go to the United States as a citizen."

Purportedly, although the record in this case didn't disclose it, the Consul says, "I don't know who you are. I am not going to give you any such consent, such permission, such documentation," and the next thing a suit is filed in this Court. And he comes in here and says the same thing to your Honor.

Now, adversary proceeding is purportedly the resolution of conflicting testimony introduced here and introduced there, [22] and you resolve it out and come to something that is supposed to be the preponderance of evidence.

But here you have an advancement of a claim—an advancement of a claim that a person says, "I am so and so and so and so; I was born such and such; I am the son of so and so," and nobody knows a thing about him other than what he says himself. And by the means of so-called measurement this Court is placed in the position of endeavoring to resolve out at what point has this individual established enough that he can say, "I am now satisfied that he is what he claims to be, and the relationship

is there, and he should be allowed to enter the United States as a citizen."

Now, I think in other arguments it has been referred to, suppose your Honor were to become responsible as a guarantor, or legally for a sum of money, and the question was whether this was the person to whom the money should be given. At what point does the mind say, "Well, I will assume the responsibility and endorse the check or sign the document, give the authority, permit a person to proceed further," and thereafter leave open the question as to whether any responsibility or liability will revolve back upon you as the individual who made that authorization.

Now, it is somewhat equivalent to that situation. Only here we have no responsibility on the judge's part. It is American citizenship which is sought and entry into the [23] United States as such.

So that you don't have the matter of preponderance of the evidence involved. You have the question, has the evidence reached the point where the judge is satisfied.

He can't resolve all doubt, no matter which way it might go. But something has to be there that he inwardly feels. Although the word "feeling" is one that is most intangible—most intangible, and you find it so often in the opinions. The judge says, "I feel." Well, what does he feel? Where does he feel it? In his big toe or in his left ear or where? If he asked himself the question, he wouldn't know where he felt it. But at a point he resolves it out and says, "Well, I feel so and so."

And I think so far as the preponderance of the evidence is concerned, that in the judge's mind he well knows the manner in which he finally resolved out the case, knows the extent to which after he has rendered his opinion it is going to be vulnerable and subject to attack in the Appellate Court, and having that in mind, why, he decides it in the way he thinks. The truth and the justice of the case purportedly calls upon him to do so.

But here is that intangible element that the thing comes from one side and the person says, "I am so and so and I am the son of so and so," and your Honor has to somehow or other reach the point where he is satisfied. [24]

Now, your Honor used the word "satisfied." You used the word "clear." You used the word "convincing." Actually, I don't think that you really interposed here a so-called clear and convincing standard in terms of the ordinary processes of, as Mr. Gale would illustrate, that up here is a level and down here is "beyond a reasonable doubt" and here is "clear and convincing" and here is "preponderance of the evidence." And you have purportedly the scales of justice, and at some point the scale goes this way or that.

You don't have any scale here, actually. And the words that we use are related to the actual problem, that the judge is satisfied that the claim is sufficiently founded upon evidentiary matter that has probative value or worth, sufficiently clear to satisfy him that the claim is good.

Now, beyond that, I think we could talk on and

on in terms of so-called preponderances and so on.

Lord knows, between Mr. Hertogs and Mr. Gale and myself, I think regardless of whether we may differ, I think we have endeavored in these various cases to talk to the Court of Appeal, endeavored to convey to them the problem that is presented here. And the fact that in this case alone, the opinion that was originally filed and the manner in which it later was ignored, judgment was vacated and sent back——

The Court: To use the language of the street, it is a passing of the buck. [25]

Mr. Gale: They passed the buck right back to this Court.

The Court: It is a difficult problem and all the judges have trouble with it. But I will be glad to hear what Mr. Hertogs has to say.

Mr. Gale: Let me add one comment, your Honor. I do not think that the—Well, let me put it this way:

I think that as between the judges, including your Honor, that there ought to be—and I suggested this to the higher court. They said, “Well, here is the rule,” but didn’t say how to apply it.

I don’t think that the outcome of the case should depend on the individual judge that happens to try the case. Now, no reflection. I mean this:

One judge may say, “I will listen to the case with my ears closed and nothing will ever convince me,” whereas another judge may, on exactly the same evidence, reach an entirely contrary de-

cision. That is not right, either. That is not what the judicial process means.

The Court: What you are saying there is a criticism of the entire judicial system. If there were some standard by which every judge would have to act in every case, and he would have to act that way, you would be a rubber stamp. You wouldn't need judges for that. It stands to reason that the human being, the judge who happens to be in the position, is the one who has to make the decision. [26]

Mr. Gale: Well, that's what makes these cases so difficult.

The Court: I don't know what you can do about that. One may decide it rightly or wrongly according to a third person's lights, and that still doesn't change the standards that are involved.

I don't think that that is—As a matter of fact, I think all this comes about, it is evident to me—I think as well as to some other judges that have more familiarity with these cases—that it is very difficult to apply a standard.

Mr. Gale: Oh, very difficult.

The Court: Because of the nature of the cases. That is all there is to it.

I agree with Mr. Collett, this is not an adversary proceeding of any kind. I don't think that was ever considered. The very language of the statute negatives that. It is a suit to declare American citizenship.

It is true it has to have as a basis for it the fact that somebody is denied some right of citizenship.

But what the Court is called upon to do is not to declare that "A" gets judgment against "B" for anything at all. By the very terms of the statute this is declaratory of citizenship.

I don't know how anybody can get away from that fact. That is what the statute says. That is the jurisdiction that is conferred, to declare whether a person is or is not an [27] American citizen.

The reason jurisdiction is invoked is because some official or government has said to Jones, "Well, I am not going to let you vote here," or "You can't come into the United States," or some other specific act which denied a man a right which he had if he were an American citizen.

So the statute says, it has given the Court the authority to declare whether a man is a citizen or not. That is really the basis upon which I proceeded in trying to formulate some rule that would be helpful. Apparently the judges up above didn't agree with that, although they have not yet held that this is an adversary proceeding of any kind.

It still is a proceeding to declare citizenship. Now, it doesn't make any difference what kind of standard you apply. I think the Court has to decide whether the person has presented sufficient evidence to show he is an American citizen. That is all.

Mr. Gale: That is it.

The Court: I think that is it.

Mr. Gale: But this is the point, your Honor: The finding of citizenship is ancillary or supplementary to the basis upon which the finding is made.

In other words, if the children are the children of Ly Shew, then they are citizens and there is nothing that the Court or anyone else can do about it. They are citizens and [28] that is it. If they are not his children, then they have no basis for a claim of citizenship.

So I think that the cart has to come before the horse, so to speak, and that while they say, "We are citizens," their claim is based upon the fact of paternity.

Now, your Honor might, as your Honor suggested, make the finding without the direct finding as to paternity; but it all gets back to that, because if your Honor determined that they are citizens of the United States it could only be based upon the finding that the relationship exists.

I don't see how very well we can get away from that fact.

The Court: Perhaps you are right about that.

Mr. Gale: As your Honor suggested, the higher court avoided making that determination, and they sent it back here for you to, again I say, to act as a Solomon and decide who is the father of these children. It is difficult. We don't deny that, but still I think the problem the Court is going to be faced with—and this is not the first difficult decision this Court has been faced with——

The Court: Certainly. Well, do you want to make some comment?

Mr. Hertogs: Well, your Honor, I have the next case on the calendar, which is identical to this case.

The Court: You might call it, and get it in the record so that we have it. [29]

The Clerk: Quong vs. McGranery, hearing on findings.

Mr. Collett: Now, that is the Chow Sing case.

The Court: This is Chow Sing.

Mr. Hertogs: Yes.

The Court: This is the case where they had previously affirmed on another ground, isn't it, and then remanded it?

Mr. Hertogs: Yes. Remanded back for reconsideration in the light of the decision in the Ly Shew case.

The Court: Then it is the same problem?

Mr. Hertogs: The same problem, and I ask that the remarks which have been previously stated on the record be considered as part of the hearing on the Chow Sing case.

Your Honor, I think the Court and counsel have more or less rather clearly expressed the views. However, I want to stress that last point which Mr. Gale raised. I think it is a most important point.

I think that the first determination and the major determination for this Court is the question of relationship. I think the rest of it will fall into line and there isn't a real opportunity for the Court to make any other determination than the determination of relationship.

If the relationship is established, United States nationality follows as a matter of course. If the

relationship is not established, they must be deemed an alien.

Now, in Mr. Collett's remarks he talked about the burden [30] of proof and the feeling that the court gets, and he feels that that feeling is the guidepost to be determinative of whether or not the relationship has been established.

Now, the Court has stated that previously the Court felt that there was not sufficient evidence in either of these cases to establish the claim of relationship, and that it didn't meet the standard of proof as announced in your Ly Shew opinion.

In this trial case, your Honor, right in the record at the conclusion of the case you made the remark that just meets the standard set forth by Mr. Collett; at that time you said you had the intuitive feeling that this was this man's son. Now, if at the conclusion of the trial this Court found that it had the feeling that this Plaintiff was this man's son, I say there is only one thing the Court can do and that is to make findings that the relationship exists. Once the relationship is established, as a matter of course and in pursuance of statute a finding of nationality must follow.

I well realize that the Court is going to have a difficult time reviewing the cases because, as the Court knows, I think it was two years ago when we went to trial on most of these cases, and during the intervening time the Court is not going to remember the witnesses. I don't think the Court is going to be able to recall any one specific [31] individual.

The Court: I have the transcript.

Mr. Hertogs: You may have the transcript, your Honor, but that's just cold writing. Lots of times I think the impression the witnesses make on the Court considerably influence the Court in the final determination.

And I think the Court should give some consideration to the fact that considerable time has passed since the time of the original trial in each of these matters.

Now, the remarks which were extended on the record in the trial case indicate that the Court had that feeling, that the Court felt that this was this man's son. And in the light of the decision of the Supreme Court of the United States, which was cited by the Court of Appeals here, not only in the recent decision but also an entirely different panel in the Mar Gong case. They cited that Supreme Court decision in which the Supreme Court said, "It is better that many Chinese immigrants be improperly admitted than one natural born citizen of the United States should be permanently excluded from this country."

Now, if the Court has that feeling, that the relationship existed, then there is the possibility that the Court would be denying an American citizen the right to remain in this country if the Court made the finding that the relationship did not exist.

I think that the standard in these cases has been pretty [32] well pronounced in the various opinions. I will state, however, that there has been considerable conflict in the numerous opinions which we

have received from the Court of Appeals. But I think that the standard that is set is the standard which is ordinarily followed in any other civil case and that no special quantum of evidence shall be required in these cases. As to what that actually means is something for the Court to determine.

I think there are other problems in the case which should be probably presented very lightly, and I think one is, in my particular case, at the time of the prior findings of the Court the Court made the determination that the plaintiff did not have a residence in the United States within the meaning of Section 503. I think that that has been more or less readily disposed of in the numerous opinions of the Court of Appeals in the meantime holding that the Court has jurisdiction in these matters.

The Court recalls, in the original case, as well as in the discussion which we had with your Honor, it was the Court's opinion that the broad purpose of the Act was not to apply to those children who had been born abroad. That issue was brought forward by Mr. Collett and argued quite extensively on appeal and lost, as well as in numerous other arguments on jurisdiction, all of which have been lost.

I think the findings of the Court, then, should be limited [33] to things which would protect the records in case plaintiff herein finds it necessary once again to take judicial review in the Court of Appeals.

I would ask your Honor in the Chow case to give

due consideration to the remarks of your Honor at the conclusion of the trial in that case.

Mr. Collett: If I may have a moment to reply to Mr. Hertogs, if the Court please, I notice two things here first:

When I was referring to the matter of the feeling of the Court and the number of times one observed in the opinions the words "I feel," I wasn't advocating anything in the nature of an "I feel" test, and that is entirely a misunderstanding on the part of Mr. Hertogs as to what I had to say. I was simply illustrating for the Court various approaches in which the mind of one individual man such as yourself may endeavor to consider these particular problems.

I was also interested to note that Mr. Hertogs when he states to your Honor that reading a cold record here does present some difficulties, as your Honor was constrained to observe in your opinion, you had before you the witnesses in all cases and, had you observed them, you reached a conclusion which was related to the credibility and the extent to which you were going to believe them; and your Honor had several times observed that when a cold record gets before the court above, that they are endeavoring to proceed [34] under rather great limitations.

Now, cases have been cited by both counsel here reviewing records of the immigration on the habeas corpus, in which it is contended at great length that the Court reviewing the case, and going down the line, setting up every sentence, there are no incon-

sistencies, no discrepancies, and therefore that's it. On the other hand, we find, if there are discrepancies, they are not material.

And although the Supreme Court has said that the Court of Appeals or this Court was not to substitute its estimate of the credibility of the hearing officer at immigration—Mr. Hertogs knows that. At least he has been educated to the extent by the arguments that we have had in the Court of Appeals.

But to go on now with this one case. I didn't say anything about this case when Mr. Beale was here. But let's look at what happened here. I think this is most interesting.

The original opinion filed on August 18, 1954, procured——

This is the four cases up there. There was the Ly Shew, Fong Wong Jing,, and this case. This is Chow Sing vs. Brownell. It's after This is Chow Sing vs. Brownell. It's after Immigration. Fong Wong Jing and Ly Shew were the Secretary of State, and Hung was the Attorney General, after the District Court had given judgment contrary to the findings of the Immigration hearing.

Now, the manner in which Judge Denman set about to [35] maneuver these cases and decide one and then the other, and then came around to Ly Shew, and picked Ly Shew out to go after, if I may use the expression, your Honor's opinion and the various matters that were taken into it, and deal with it specifically and go down the line and

treat it, if I might characterize it, a bit roughly, was extremely interesting.

Now, they took Fong Wong Jing—the judge did—and that decision was affirmed. Now, Chow Sing was likewise affirmed, procurium. With Lee Fong Hong, they affirmed his likewise and they disposed of the jurisdictional contentions that were made.

When we get to Ly Shew, they very casually brush that all aside, “Now we are going to take that opinion and go after that so-called standard of proof which is indicated in that opinion,” as Judge Denman so conceived.

But in this case, Chow Sing, following the words of Mr. Hertogs, “We find the evidence sustains the findings.” Although the findings was that your Honor was not satisfied with evidence of sufficient clarity. Very interesting.

“The questions raised concerning the jurisdiction of the District Court are disposed of by Ly Shew—(reading)”

That was filed and opinion substituted. This opinion was substituted for the first opinion procurium in Chow Sing. In Ly Shew the opinion was not substituted. Apparently the [36] opinion of Judge Denman was not treated as an opinion at all because Judge Bone defended from it and Judge Mathews had not signed the opinion but had simply concurred in the result. So when Judge Bone and Judge Mathews concurred in an opinion, that was filed as an opinion and the judgment of the court was vacated.

In this opinion, however, the findings which is

the same one, Judge Mathews said the finding was not clearly erroneous. Citing it. Quoting it.

“The District Court found the Plaintiff, Chow Sing, did not produce evidence of sufficient clarity to satisfy a conviction of this Court that Chow Yit Quong was the natural blood father of the person known as Chow Sing, or that the person Chow Sing who appeared before the Court claiming to be Chow Sing is in truth and fact Chow Sing. Thus, in effect, the District Court found that Chow Sing had not sustained the burden of proof. The finding is not clearly erroneous.”

The finding was approved.

However, because of the defense, apparently, or whatever has gone on in the Court of Appeals in the Ly Shew case and the opinion there in which Judge Denman made so much that your Honor had set up as standard of clear and convincing proof, which is related to the contention that Mr. Gale has made that you have up here “beyond a reasonable doubt” and [37] here “clear and convincing” and here “preponderance of the evidence,” that somehow or other was injected in here. Judge Mathews in the Ly Shew case here, instead of reversing the judgment, sent it back and then afterwards, when the further petition for rehearing were filed, or they considered it separately, or their attention was called to the fact that the same findings was in this Chow Sing, which had been affirmed by Judge Denman in the first place, *procurium*, which was later affirmed by the substituted opinion, they

felt constrained to send that one back for the same reason.

Now, I say that the Court in clearly passing upon your Honor's finding, recognized what I was advocating a few minutes ago: That considering the posture of these cases, it isn't a clear and convincing standard in the ordinary concepts of an adversary proceeding that your Honor had applied here. You simply stated that the evidence was not of sufficient clarity to satisfy you. Which is exactly the proper standard, apparently, and the Court in passing upon it, when their minds were considering it, without the conflicts which have existed on extraneous matters, which may now so well be considered due to the fact that Judge Denman filed such a lengthy opinion that apparently was so very critical of the opinion of this Court, that it disturbed them enough so that they have sent both of those cases back.

Now, I say herein regard to both counsel that we stand [38] here as officers of the Court, and that citizenship of the United States and the judicial procedure of the judicial system of the United States is likewise before all of us. And our responsibilities here are to help this Court to reach a proper standard in that people who have claims to being citizens of the United States, who have never been here before, whether they are Chinese or whether they are Russians, or of any country of the world, when they come forward and make claims, we must all stand and uphold the standards that they don't come in here on mere scintilla or mere

suggestion or no proof whatsoever, simply because it may satisfy some particular attorney that he has a client, to let that individual come in.

We should stand together before the Court to help the Court sustain the proper standards upon which people who claim to be citizens can be admitted as such without any preparation of any kind.

So that, your Honor, I think with those words of mine, in considering these two opinions, that you may well be guided that the original standard that you applied was not a clear and convincing standard in the ordinary concepts of adversary proceedings, but was the proper standard which the Court has well passed upon from the beginning, pro curium, all three judges, Judge Denman concurring, and now the other two judges with no indicated dissent so far as this Chow Sing [39] case is concerned, but because of the Ly Shew case and the difference, whatever it may be, that this case had to come back.

Mr. Hertogs: Just a short reply, your Honor.

I certainly wholly agree with Mr. Collett, in the first place, that United States citizenship is probably something that is to be cherished and upheld, not only in this Court but everywhere; and I think that we, as counsel, representing these plaintiffs, are attempting to establish true claims of United States nationality.

Congress has prescribed the standards for acquiring United States citizenship. Congress has stated, and this statute has been on the statute books now since 1875, that a person born abroad of

a United States father shall be deemed a United States citizen.

We feel that we have clearly established that these people are, under the standards set by Congress, entitled to United States citizenship. I say that we are attempting to prove to this Court by evidence the fact that these people have established the validity of their claims.

I say on the other side that the same thing is true for the counsel for the Government, and it has been stated before the Court of Appeals many times in the past, that the Government has as great a burden to establish the claim of validity of United States citizenship if it exists as they have to establish [40] alienage.

Take, for instance, this Fong case that Mr. Collett has referred to. It was not until the day before the petition for rehearing was denied in the Circuit Court that I learned that at the time that we proceeded to trial in this Court, and at the time that we argued the case in the Court of Appeals of the Ninth Circuit, the Government was in possession of a file which clearly showed that these people had been denied a privilege by the American Consul in Hong Kong. Yet counsel came before the Court, and came before the Court of Appeals, and that is the basis of the rejection of that claim in the Court of Appeals, that there never was a denial by the American Consul in Hong Kong. Yet at the time we proceeded to trial, and at the time we argued the case in the Court of Appeals, the time the Gov-

ernment filed its petition for rehearing, the time I filed my petition for rehearing, the United States Attorney's office here in San Francisco was in possession of a record which had been forwarded from the American Consul at Hong Kong through the Immigration and Naturalization Service in San Francisco, and it was in the possession of the office here.

Now, failure to disclose that fact has prevented these people from having a judicial determination of their claim of United States citizenship. I think that that is just as wrong as anything could be. There is just as great a burden [41] on the other side to establish the claim, if it exists, as there is to establish alienage.

Now, turning to this case here, the Chow Sing case, there are some factors which have not been brought out to this Court. There were in the decision handed down on August 18, 1954. There are subsequent opinions of the Court of Appeals. I think on September 17th, 1954, the Government filed petition for rehearing in all four cases. I filed a petition for rehearing in the Fong case as well as the Chow Sing case.

Subsequently, on November 23rd, the Court of Appeals handed down two new opinions, substituted in lieu of the opinions of August 18th. That happened in the Fong case in which the Court made the determination that the Court had jurisdiction to hear the cases.

They handed down the decision of November 24th in the case of Chow Sing. Now, at that time, the

time the decision was handed down on November 24, 1954, the Court had not yet handed down its decision in the Ly Shew case.

I would like to read a short paragraph with regard to the validity, or the claim of relationship as decided by Judge Mathews in the opinion of November 24:

“Sing appeared at the trial and by his guardian ad litem introduced evidence, some of which tended to show that Chow Yit Quong was the father of the person known as Chow Sing and that Sing was that person. Some of the evidence so [42] pending was uncontradicted. However, the District Court was not required to believe such evidence or accept it as true.”

That went under Rule 52 which says the Circuit Court will not reverse the judgment of this Court on findings unless they are clearly erroneous.

Subsequently that opinion of November 24th was set aside and a new opinion remanding it to this Court filed after the Court of Appeals had handed down its decision in the Ly Shew case dated December 30th. There were subsequent modifications, as the Court knows, of January 4th, January 5th and January 6th.

Therefore, after the Court of Appeals had decided and reversed the older determination in the Ly Shew case they came to the conclusion that the standard of proof which had been expressed in Your Honor's opinion was not the standard of proof to be applied in these cases. And since the Court in this Chow Sing case at the time of judgment has

stated that the plaintiff failed to meet the standard of proof as fixed by Ly Shew in the Atchison case, the Court had no alternative but to remand this case in the same manner as the other case. And as the Court has pointed out in here, most of the evidence was uncontradicted. There was evidence tending to establish the validity of claim and the fact that this boy was that man's son.

In addition, you have the remarks of Your Honor as to [43] your feeling that this relationship existed.

I think the entire claim is well-founded, and I wouldn't be before this Court urging a declaratory judgment of United States nationality unless I felt that this boy was a citizen of the United States.

Mr. Collett: Well, if the Court please, if I may have just one word, counsel has injected into this——

The Court (Interposing): Well, I don't think we want to spend time on those extraneous matters, Mr. Collett. I have enough to do deciding these findings without deciding what happened before.

Mr. Collett: For no good reason that I can see he injected some possible wrong-doing on the part of the Government and I would reply to that. It has no bearing whatsoever and there was no necessity for that at all at this time.

Mr. Gale: May I ask Mr. Collett's remarks in the Chow Sing case be considered by the Court in connection with the other case?

The Court: I will consider them all together.

I think the best thing to do, gentlemen, is to sub-

mit this matter, and I will file some supplemental memorandum in the case and follow the mandate of the Circuit Court of Appeals as best I can. Mark the matter submitted.

Mr. Gale: Will it serve any purpose for either of us to file any memorandum? [44]

The Court: Well, I have the whole record.

Mr. Hertogs: Does the Court desire copies of the briefs which were filed in the Circuit Court of Appeals for both sides?

The Court: I have the complete record of these cases.

I have everything available to me that I really need.

Mr. Hertogs: There were briefs and re-briefs and ——

The Court: Every time a brief is filed in any case the Clerk of the Court of Appeals always sends it to the District Judge.

Mr. Gale: I want to point out one thing, if your Honor will permit.

Your Honor in your opinion made the statement, perhaps not thinkingly, that all the testimony in the Ly Shew case was in the Chinese language. That, your Honor, is not correct. There was English testimony also in that case and perhaps your Honor in re-reading the record will keep that fact in mind.

The Court: Well, all the material testimony, I think.

Mr. Gale: No, there was testimony by children of Ly Shew and other witnesses in the English language.

Mr. Hertogs: The same is true in my case, your Honor. I think three out of the four witnesses were in English.

Mr. Gale: We had both, but your Honor, in the Ly Shew opinion, made the statement, that perhaps wasn't intended as [45] such, and your Honor again reiterated in your remarks from the Bench that "where all the testimony was in the Chinese language."

Ly Shew's testimony and the children's testimony was in the Chinese language, but other children and other witnesses were in the English language. Perhaps you Honor might keep that fact in mind in re-evaluating the testimony.

The Court: All right, I will mark the matter submitted.

Certificate of Reporter

I, Official Reporter pro tem, certify that the foregoing transcript of 46 pages is a true and correct transcript of the matter therein contained as reported by me (us) and thereafter reduced to type-writing, to the best of my ability.

/s/ KENNETH J. PECK.

[Endorsed]: Filed March 23, 1955. [46]

[Title of District Court and Cause.]

CERTIFICATE OF CLERK TO RECORD
ON APPEAL

I, C. W. Calbreath, Clerk of the United States District Court for the Northern District of California, do hereby certify that the foregoing documents, listed below, are the originals filed in this court in the above-entitled case and that they constitute the record on appeal herein as designated by the attorneys for the appellant:

Mandate of the U. S. Court of Appeals;

Findings upon remand from the Court of Appeals;

Judgment;

Notice of appeal;

Designation of Record;

Cost bond on appeal;

Reporter's Transcript, March 11, 1955 (as in the Ly Shew vs. Dean Acheson case).

In Witness Whereof, I have hereunto set my hand and affixed the seal of said District Court, this 11th day of July, 1955.

[Seal] C. W. CALBREATH,
Clerk;

By /s/ WM. C. ROBB,
Deputy Clerk.

[Endorsed]: No. 13746. United States Court of Appeals for the Ninth Circuit. Chow Sing, by His Guardian Ad Litem, Chow Yit Quong, Appellant, vs. Herbert Brownell, Jr., as Attorney General of the United States, Appellee. Transcript of Record. Appeal from the United States District Court for the Northern District of California, Central Division.

Filed July 11, 1955.

/s/ PAUL P. O'BRIEN,

Clerk of the United States Court of Appeals for the
Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit

No. 13,746

CHOW YIT QUONG, Guardian Ad Litem for
CHOW SING,

Appellant,

vs.

HERBERT BROWNELL, JR., Attorney General
of the United States,

Appellee.

STATEMENT OF POINTS ON WHICH AP-
PELLANT INTENDS TO RELY IN THE
APPEAL OF THE ABOVE-ENTITLED
MATTER

Comes now Chow Yit Quong, Guardian Ad Litem
for Chow Sing, by and through his attorney, Joseph
S. Hertogs, and files herein the statement of points
on which appellant intends to rely in the appeal of
the above-entitled matter:

I.

That the findings of the District Court are clearly
erroneous.

II.

That the District Court failed to comply with the
mandate of this Court.

III.

That the findings, conclusions and judgment of
the District Court are unsupported by the evidence
of record.

IV.

That the findings, conclusion and judgment of the District Court are contrary to the evidence of record.

V.

That the District Court erred in findings that the plaintiff-appellant did not have a claim to permanent residence within the Northern District of California or in the United States of America.

VI.

That the District Court erred in concluding that the plaintiff-appellant, Chow Sing, is not a United States citizen.

JACKSON & HERTOGS,
Attorneys for Appellant,

By /s/ JOSEPH S. HERTOGS.

[Endorsed]: Filed July 27, 1955.

No. 13,746

IN THE

**United States Court of Appeals
For the Ninth Circuit**

CHOW SING, by his guardian ad litem,
Chow Yit Quong,

vs.

HERBERT BROWNELL, JR., Attorney Gen-
eral of the United States,

Appellant,

Appellee.

BRIEF FOR APPELLANT.

JACKSON & HERTOGS,

JOSEPH S. HERTOGS,

580 Washington Street, San Francisco 11, California,

Attorneys for Appellant.

FILED

JUL 1 1953

PAUL F. O'BRIEN

CLERK

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IN THE

**United States Court of Appeals
For the Ninth Circuit**

CHOW SING, by his guardian ad litem,
Chow Yit Quong,

Appellant,

vs.

HERBERT BROWNELL, JR., Attorney Gen-
eral of the United States,

Appellee.

BRIEF FOR APPELLANT.

JURISDICTIONAL STATEMENT.

The plaintiff-appellant filed in the United States District Court for the Northern District of California, Southern Division, a petition seeking a declaratory judgment of United States citizenship. Such action was commenced in accordance with the provisions of Section 503 of the Nationality Act of 1940 (54 Stat. 1171, 8 U.S.C.A. 903).

The District Court denied plaintiff's petition for a declaratory judgment (T. 24) and the plaintiff appealed (T. 25). Jurisdiction of this Court to review the District Court's decision is conferred by 28 U.S.C.A. 1291 and 1292.

STATUTES INVOLVED.

Section 1993 of the Revised Statutes of the United States, as amended by Section 1 of the Act of May 24, 1934 (48 Stat. 797) reads:

“Any child hereafter born out of the limits and jurisdiction of the United States, whose father or mother or both at the time of the birth of such child is a citizen of the United States, is declared to be a citizen of the United States; but the right of citizenship shall not descend to any such child unless the citizen father or mother, as the case may be, has resided in the United States previous to the birth of such child. In cases where one of the parents is an alien, the right of citizenship shall not descend unless the child comes to the United States and resides therein for at least five years continuously immediately previous to his eighteenth birthday, and unless, within six months after the child’s twenty-first birthday, he or she shall take an oath of allegiance to the United States of America as prescribed by the Bureau of Naturalization.”¹

Section 503 of the Nationality Act of 1940 (8 U.S.C.A. 903) provides, in so far as pertinent here:

“If any person who claims a right or privilege as a national of the United States is denied such

¹The requirement that such children must reside in the United States for at least five years immediately previous to attaining the age of 18 years was retrospectively changed by the 1940 Act to provide that such residence must be between the ages of thirteen and twenty-one years (8 U.S.C. 601(g)(h)), and was again retrospectively changed by the 1952 Act to require that the child must come to the United States before attaining the age of twenty-three years and must be continuously physically present in the United States for five years between the ages of fourteen and twenty-eight years. (8 U.S.C. 1401(b)(c).)

right or privilege by any Department or agency, or executive official thereof, upon the ground that he is not a national of the United States, such person, regardless of whether he is within the United States or abroad, may institute an action against the head of such Department or agency in the District Court of the United States for the District of Columbia or in the district court of the United States for the district in which such person claims a permanent residence for a judgment declaring him to be a National of the United States. * * *²

STATEMENT OF THE CASE.

The appellant claims to be the lawful blood son of Chow Yit Quong. The defendant-appellee admits that the said Chow Yit Quong is and was at the time of the birth of the appellant a United States citizen.

The appellant arrived at the port of San Francisco, State of California, ex the SS "President Wilson" on August 23, 1950, seeking admission to the United States as a citizen thereof. A Board of Special Inquiry denied appellant's application for admission and recognition as a United States citizen. The appellate administrative authorities affirmed the Board's decision and excluded the appellant from the United States. Thereafter, this action was brought in the

²This statute has been repealed by the Immigration and Nationality Act of 1952 (8 U.S.C. sec. 1101, et seq.) which became effective December 24, 1952, but Section 405(a) of the latter Act continues the former statute in force and effect as to suits which were pending before the new Act became effective. (66 Stat. 280.)

Court below under the provisions of Section 503 of the Nationality Act of 1940 (8 U.S.C.A. 903) for the purpose of establishing the United States nationality of the appellant herein.

The case came to trial without a jury. The appellant, his father, Chow Yit Quong, his brother, Chow Sam, and one disinterested witness, testified concerning the claimed relationship. Under date of January 12, 1953 the lower Court concluded that the "evidence presented by plaintiff does not conform to the standards fixed in *Ly Shew v. Acheson*, No. 30,159 and No. 31,161, this day decided". Accordingly, judgment was entered for defendant. It is from this judgment that the appellant prosecutes this appeal.

The Court below made the following findings of fact and conclusions of law:

"1. It is not true that the permanent residence and domicile of the person who claims to be plaintiff Chow Sing is within the Northern District of California, or in the United States of America.

2. The person who claims to be plaintiff Chow Sing has failed to introduce evidence or sufficient clarity to satisfy or convince this Court that Chow Yit Quong is the natural blood father of the person known as Chow Sing, or that the person who appeared before the Court claiming to be plaintiff Chow Sing is in truth and in fact Chow Sing.

Conclusions of Law.

The person appearing before the Court as plaintiff in this action is not entitled to the relief prayed for."

SPECIFICATIONS OF ERROR.

1. That the Findings of the District Court are clearly erroneous.

2. That the findings, conclusions and judgment of the District Court are unsupported by the evidence of record.

3. That the findings, conclusion and judgment of the District Court are contrary to the evidence of record.

4. That the District Court erred in finding that the plaintiff-appellant did not have a claim to permanent residence within the Northern District of California or in the United States of America.

5. That the District Court erred in concluding that the plaintiff-appellant, Chow Sing, is not a United States citizen.

ARGUMENT.

It was stipulated at the trial that Chow Yit Quong (alleged father of the appellant) is a United States citizen (T. 37). It was also stipulated that the said Chow Yit Quong first arrived in the United States at the port of San Francisco, California and was admitted as a citizen on June 30, 1923; that he departed from San Francisco on August 21, 1926; that he returned to the United States through the port of San Francisco on March 6, 1928; that he departed from San Francisco on August 12, 1932; that he returned to the United States through the port of Los Angeles,

California on March 11, 1939; that he departed from the port of San Francisco on November 17, 1939; that he returned to the United States through San Francisco on November 7, 1940; that he departed again on December 12, 1946 and returned on August 31, 1950 (T. 39).

The appellant claims birth at Canton City, China on August 23, 1934. He claims that his lawful blood father is the said Chow Yit Quong who was present in the courtroom at the time of trial in these proceedings.

Appellant contends that he is a citizen and national of the United States. Section 1993 of the United States Revised Statutes, as amended, which were in effect at the time of the birth of this appellant, specifically provided that a foreign-born child of a United States citizen acquired United States citizenship at birth. As this Court has previously stated, *Gung You v. Nagle*, 34 F.2d 848, 851:

“* * * question in the case of applicants who claim citizenship by reason of being sons or daughters of an American citizen is the question of paternity.”

Therefore, the sole issue left for the determination of the trial Court in this particular matter is whether the appellant is the son of a recognized United States citizen. This relationship was the sole issue in *Quan Toon Jung v. Bonham*, 119 F. 2d 915, 916.

Also see *Yep Suey Wing v. Berkshire*, 73 F.2d 745, 746.

Once the relationship of the appellant to the said Chow Yit Quong, a recognized United States citizen, has been established by evidence of record, the appellant must be deemed to have acquired United States citizenship in accordance with the provisions of that Statute. The claim to United States citizenship having been established, the appellant is entitled to a declaratory judgment of United States nationality.

Acheson v. Yee King Gee, 184 F.2d 382;

Wong Gan Chee v. Acheson, 95 F.Supp. 815;

Toy Teung Kwong v. Acheson, 95 F.Supp. 745.

The Court below in giving judgment against this appellant filed no opinion, but set forth in its memorandum order for judgment (T. 21) that the evidence presented by the appellant did not conform to the standards enunciated in the opinion filed the same day by the same Judge in the case of *Ly Shew v. Acheson*, 110 Fed. Supp. 50.

We submit that the principles laid down by the lower Court in the *Ly Shew* decision, *supra*, are contradictory to the normal degree of proof required in proceedings of this nature. It is a generally recognized rule of law that in civil cases the party having the burden of proof must establish the ultimate facts by a preponderance of the evidence. As was stated by the Court in *Ex parte Cheung Tung*, D.C., Wash., 292 F. 997, 1000:

“For the officers to require more conclusive evidence than the petitioner has furnished is to demand proof beyond all doubt and to a moral

certainty, and such requirement would constitute a fundamental error in the application of the law.’’

See:

Ex parte Delaney, 77 F. Supp. 312, 322, affirmed
9 Cir., 170 F. 2d 239.

It is asserted that it is not necessary that the appellant’s evidence be uncontradicted, nor that the evidence most favorable to his contention carry conviction beyond a reasonable doubt. The quantum of evidence, in whose favor it preponderates, shall be determinative as to whether the evidence sustains the burden of proof.

See:

Lilienthal’s Tobacco v. United States, 97 U.S.
237, 24 L. Ed. 901, 905.

We do contend most earnestly that where, as here, there is positive testimony as to the existence of the asserted relationship, a decision adverse to the claimant can not be supported. We believe that the appellant established the claimed relationship by more than a fair preponderance of the evidence. The appellant identified himself by direct and positive evidence as the lawful son of a United States citizen, and as such lawful son he is legally entitled to recognition by this Court. Chow Yit Quong (father of the appellant) testified that he married Wong Suey Hong in China in 1917; that his wife, Wong Suey Hong, died in China in 1943; that his son, Chow Sam who is now

29 years of age was admitted to the United States in 1940; that his son, Chow Sam, was present in the courtroom at the time of trial of these proceedings (T. 43); that his son, Chow Hing, was also admitted to the United States in 1940 but is presently serving in the United States Army (T. 43); and that his son, Chow Sing (the present appellant) was born at Canton City, China on August 23, 1934 (T. 44).

This witness, Chow Yit Quong, stated that he was present at the time of the birth of his son, the appellant; that he has seen his son, Chow Sing, often enough during the intervening years to clearly recognize him as his son (T. 57); that he lived with this boy in China from the time of his birth until the time of his return to the United States in 1939 (T. 44). That he lived with the appellant during his trip to China in 1940, and on his subsequent return to China from early 1947 to 1950; that his wife, Song Suey Hong, was the mother of Chow Sing (T. 51). It was further stated that this appellant always lived with the witness during his trips to China; that he and the appellant always slept in the same house; that they ate their meals together; that he consistently claimed throughout the years a son named Chow Sing; that the person in the courtroom is the same Chow Sing that he has consistently claimed throughout the years, and that the said Chow Sing is his lawful blood son (T. 51 et seq.).

The appellant, Chow Sing, testified that he is presently residing with his father; that they have the same

sleeping accommodations (T. 101); that immediately prior to coming to the United States he resided with his father in China (T. 102 and 105); that they lived together in the same house; that they had their meals together; that the said Chow Yit Quong always treated the appellant as his son, and that he always identified and introduced Chow Yit Quong to his friends as his father (T. 106); that he has a brother by the name of Chow Sam; that this brother, Chow Sam, was present in the courtroom; and that he and Chow Yit Quong have always spoken to each other as father and son (T. 106).

The Government stipulated that the witness, Chow Sam, was admitted to the United States as a citizen and that such admission was based upon his relationship to Chow Yit Quong (T. 136). This witness, Chow Sam, testified that his father is Chow Yit Quong, who was present in the courtroom; that his mother was Wong Suey Hong; that he has a brother by the name of Chow Sing who was born in Canton City and who is presently 18 years of age; that he lived with the said Chow Sing in China for approximately 6 or 7 years; that he and the said Chow Sing resided together in the same house, had their meals together, slept together, and that they have always spoken to and introduced each other as brothers (T. 136 et seq.). This witness further testified that Chow Sing was the son of his mother, Wong Suey Hong, and his father, Chow Yit Quong (T. 138). This witness also identified the boy whose picture appeared in Exhibit 2 as his brother, Chow Sing, the present appellant (T. 144).

A disinterested witness, So Tak, testified that during a temporary trip to China in 1947, he met the appellant, Chow Sing, in the home of Chow Yit Quong (T. 93 and 96); that the Chow Sing who was present in the courtroom is the same boy that he met in Canton City in 1947 (T. 95); that while he was in Canton City during his trip to China in 1947, he visited the home of Chow Yit Quong every day; that the said Chow Yit Quong introduced Chow Sing to him as his son (T. 96); that Chow Yit Quong and Chow Sing were living together in the same home as father and son.

Plaintiff's exhibits 3, 4, 5, 6 and 7 establish a consistent claim over a long number of years by Chow Yit Quong that he had a son identified as Chow Sing. Plaintiff's exhibit 8 was a photograph taken at the time of the marriage of the witness, So Tak, in Canton City, China in 1947. The appellant, his father, Chow Yit Quong, and the witness all appear in that picture. Plaintiff's exhibit 1 is a photograph that Chow Yit Quong had taken in China prior to his last return to the United States. Chow Yit Quong identified the persons appearing in that photograph as himself, his son Chow Sing, a god-daughter, his second wife and a son by his second marriage (T. 47). The appellant, Chow Sing, likewise identified these individuals in the same manner (T. 103).

Exhibit B shows the efforts of Chow Yit Quong to bring the appellant to the United States as his lawful son since September 17, 1946 (T. 111).

In accordance with an earlier Court Order, the appellant and his father, Chow Yit Quong, submitted to blood grouping examinations. It was stipulated that such examinations conducted by the Government show compatible blood groupings (T. 56).

The foregoing was the testimony and evidence offered in behalf of this appellant. The appellee offered no evidence whatsoever other than the prior immigration proceedings which were admitted into evidence for a limited purpose and directed only to those special questions and answers which were set forth in the interrogatories and denied in the answer to the interrogatories (T. 151).

The foregoing evidence clearly manifests the existence of the claimed relationship of father and son. This pedigree evidence is more than sufficient to sustain the issue it covers. Such testimony is entitled to consideration in arriving at a decision in this matter.

This Court has previously stated:

“He took the stand and testified in his own belief concerning his place of birth. This evidence of course was hearsay, but nevertheless, it is the type of hearsay which is permitted. *U. S. v. Wong Gong* (C.C.A.), 70 F.2d 107.”

Lee Hin v. United States, 74 F.2d 172, 173.

It was stated by Judge Wilbur in the case of *Gung You v. Nagle*, 34 F.2d 848, at page 852:

“Relationship is not usually proven by physical facts, and never is where the mother does not testify, but by pedigree, reputation in the family and

by the conduct of the parties, including the manner in which they live. The fact that a small child lives in the home of its alleged parents and that they maintain toward each other the obligation involved in the relationship is evidence favorable to the issue, and evidence that they did not live together and did not conduct themselves as parent and child is evidence to the contrary. Such evidence is not collateral evidence, it is direct and material evidence on the issue."

The present type of action is a judicial litigation where there are two parties, the proponent and the opponent. It is elementary that if the proponent makes out a *prima facie* case, not one of moral certainty or beyond a reasonable doubt, but sufficient to support his allegations, then the burden of evidence shifts to the opponent to answer it. If the opponent does nothing about it, he fails and the proponent succeeds.

"Whenever litigation exists somebody must go on with it; the plaintiff is the first to begin; if he does nothing he fails. If he makes out a *prima facie* case and nothing is done to answer it, the defendant fails."

Jones on Evidence, 2nd Edition, Section 176.

"*Prima facie* evidence is a minimum quantity. It is that which is enough to raise a presumption of fact; or again, it is that which is sufficient when un rebutted, to establish the fact."

Otis & Co. v. Securities & Exchange Comm., 176
F.2d 34.

The appellant introduced for the Court's consideration the best available evidence. This evidence presented was stronger than that necessary to establish a prima facie showing of the claimed relationship, and unless this affirmative showing is rebutted it is sufficient to warrant judgment in appellant's favor.

When no contradictory evidence is offered, unsupported allegations are not sufficient to overcome the prima facie showing.

Wong Gam Chong v. United States, 111 F. 2d 707;

Leong Kwai Yin v. United States, 9 Cir., 31 F. 2d 738;

Fong Lum Kwai v. United States, 9 Cir., 49 F. 2d 19;

Lee Choy v. United States, 9 Cir., 49 F. 2d 24.

What evidence or proof then, if any, was offered by the appellee to offset and controvert this positive and affirmative showing by the appellant. No evidence was submitted which was of an affirmative nature. The appellee relied upon a few minor discrepancies which developed at the time of the prior administrative hearing. In view of the appellant's age at the time of the occurrence of these events, it was not surprising that he was unable to answer in minute detail some of the questions propounded. Even admitting that such minor discrepancies do exist, it is asserted that under the settled principles heretofore mentioned, the findings of the Court below adverse to the claim of the appellant are clearly erroneous within the meaning of Rule

52(a) of the Federal Rules of Civil Procedure. The Court can not wholly disregard without sufficient reason the evidence offered by the appellant and his witnesses to establish his claim to United States citizenship.

See:

Wong Kam Chong v. United States, 111 F. 2d 707, 712;

Lau Hu Yuen v. United States, 9 Cir., 85 F. 2d, 327.

Likewise, any slight discrepancy should be completely disregarded.

See:

Young Lee Gee v. Nagle, 53 F. 2d 448.

Jung Yen Loy v. Cahill, 81 F. 2d 809, 813.

It was stated by the Court of Appeals for the First Circuit in *Ward v. Flynn*, 74 F. 2d. 145, at page 146:

“* * * to reject sworn, consistent, unimpeached and uncontradicted testimony, there must be a real reason which would be regarded as adequate by fair minded persons.”

The decision of the lower Court in the *Ly Shew* case, supra, was one of the first written opinions concerning the quantum of evidence necessary to establish United States nationality under the provisions of 8 U.S.C.A. 903. Prior to such opinion, many favorable judgments were entered in other Courts upon the basis of the preponderance of evidence rule. Similar rulings have even been obtained subsequent to the decision of the Court in this particular matter.

See:

Lee Mon Hong v. McGranery, 110 F. Supp. 682;
Gee Leung v. Acheson, USDC, Southern Dist.,
 Calif., N. D., unreported, decided May 20,
 1953.

Upon conclusion of the trial, after submission of the evidence and closing arguments of counsel, Judge Goodman stated:

“Now, Mr. Hertogs, my feeling in the matter is, and it is just a sort of an intuitive feeling—I’m inclined to think that maybe this boy is the son.”
 (T. 177.)

Even though the Court expressed its opinion that this boy could be the son of his alleged father, his claim was denied in the face of no countervailing evidence. It was a decision of this nature that gave rise to the prior expression of this Court in regard to the phrase “a Chinaman’s chance”.

See:

Yuen Boo Ming v. United States, 103 F. 2d 355,
 358.

Certainly the summary rejection of this appellant’s claim of United States citizenship, based on speculation, conjecture and unsupported allegations, is contrary to the weight of the evidence. Even though this Court has not previously considered and ruled upon the particular question here presented, it has over a long period of time dealt with a similar situation where administrative decisions of the Immigration and Naturalization Service were under attack in ha-

beas corpus proceedings. In those cases, the power of the Court to review the decisions of the administrative body was distinctly restricted compared with the latitude here. However, we submit that principles laid down by this Court in that type of case are pertinent and should be given consideration.

In *Go Lun v. Nagle*, 22 F. 2d 246, 248, with regard to such a review this Court said:

“We fully appreciate the narrow limits of the jurisdiction of the courts on habeas corpus proceedings to review decisions of the immigration tribunals; but ‘the error of an administrative tribunal may, of course, be so flagrant as to convince a court that the hearing had was not a fair one’. *Tisi v. Tod*, 264 U. S. 131, 44 S. Ct. 260, 68 L.Ed. 590. Such a case is presented here.

“A reading of the entire testimony of the three witnesses leaves not the slightest room for doubt that their relationship was fully established, and that the appellant is a citizen of the United States. A contrary conclusion is arbitrary and capricious and without any support in the testimony.

“In *Johnson v. Damon* (CCA) 16 F. 2d 65, the court considered discrepancies on which an excluding decision was based, more important than any disclosed by the present record and in reference to the excluding decision said ‘The mind revolts against such methods of dealing with vital human rights.’ That language might well be applied here.”

The case of *Johnson v. Damon*, supra, from which this Court quoted the forceful language just men-

tioned, involved two Chinese boys who sought entry as sons of a citizen who died when they were infants. Their testimony was supported by that of a previously admitted brother and an uncle. The evidence, therefore, was basically similar to that in the case at bar, but somewhat weaker. Despite the statutory limitations upon the power of the Court to review the administrative decision, the Court in that case was impelled to overturn that decision in the forceful language quoted by this Court in the *Go Lun* case, *supra*.

In speaking of the rejection by administrative tribunals of uncontradicted and unimpeached testimony by the appellant and his alleged relatives in *Gung You v. Nagle*, 34 F. 2d 848, 852, this Court said:

“The mere hearing of witnesses by an officer is of no avail to a party, if the evidence of competent witnesses is to be entirely disregarded and findings made in the teeth of the testimony of one or a dozen such witnesses, either because of a fixed policy, to *give a weight to a presumption of law far beyond the legislative intent*, or because of a policy calculated to entrap the witness * * * .” (*Italics added.*)

In conclusion, this Court held that the rejection of the evidence of the several witnesses was purely arbitrary.

See also:

Quan Toon Jung v. Bonham, (C. A. 9) 119 F. 2d 915;

Wong Tsick Wye et al. v. Nagle, (C. A. 9) 33 F. 2d 226.

In *Chun Kwock Quan v. Proctor*, 92 F. 2d 326, this Court has extensively reviewed the well established principles applicable to judicial review of *administrative* findings in Chinese citizenship cases. In that case the Court points out that such findings must have some factual support in the record, that suspicion may not take the place of actual evidence, that evidence may not be disregarded because of a belief that frauds may have been committed by other Chinese in other cases, and that it is the province of the Courts, in proceedings for review of decisions of the immigration officials, to prevent abuse of the statutory power wielded by them.

It seems obvious that an administrative finding of fact adverse to the appellants would not withstand even the limited review afforded on habeas corpus proceedings, under the foregoing decisions and many others to the same effect. Moreover, it is plain under the authorities hereinbefore cited that the power of appellate review of findings of fact under Rule 52(a) of the Federal Rules of Civil Procedure is even *broad*er than it is in the case of administrative findings which carry statutory finality. Consequently, we submit that the findings of the Court below are "clearly erroneous" within the meaning of Rule 52(a) of the Federal Rules of Civil Procedure.

This Court has further held that in such proceedings the evidence must be weighed in the light of the defendant's ability to produce evidence (*Lee Hin v. United States*, (C. A. 9) 74 F. 2d 172), that such evi-

dence cannot be rejected because the witnesses are Chinese (*Yee Chung v. United States* (C. A. 9) 243 F. 126, 130; *Lau Hu Yuen v. United States* (C. A. 9) 85 F. 2d 327, 330) and that the requirement of former Sec. 284, Title 8, U.S.C.A. that citizenship of a Chinese person must be proved "to the satisfaction of" the Judge or Commissioner "means nothing more than that the proofs must be sufficient to satisfy reasonable judicial standards". (*Ching Hong Yuk v. United States* (C. A. 9) 23 F. 2d 174, 175.)

We submit that the foregoing principles enunciated by this Court in reviewing administrative decisions and judgments in judicial deportation proceedings are applicable here by analogy.

Applying these principles, it must be concluded that the decision of the lower Court is erroneous.

The Court below erred in concluding that the appellant did not have a claim of permanent residence in the Northern District of California. With regard to the first finding of fact, we would point out additionally that the allegation in the complaint (T. 4) that appellant claims permanent residence within the Northern District of California constituted sufficient basis for invoking the jurisdiction of the Court under 8 U.S.C., Sec. 903, *supra*. (*Acheson v. Yee King Gee*, 184 F. 2d 382; *Look Yun Lin v. Acheson*, 87 F. Supp. 463). This particular finding does not go to the merits of the case, and since the statute permits the claimant to sue in the "District of Columbia or in the district in which such person claims a permanent residence"

(italics added) obviously it was intended to permit the claimant to choose the forum. Apparently the first finding of the Court below is merely ancillary to the further finding that appellant had failed to prove that he is the child of Chow Yit Quong, and the latter finding, we submit, cannot stand for the reasons heretofore discussed.

SUMMARY.

For the reasons and authorities herein discussed, we submit that the Court below erred in holding that the appellant failed to establish his claim to United States nationality. We submit that the rejection of the positive and affirmative evidence in this case was clearly erroneous. Moreover, that suspicion as pronounced in the lower Court's decision in the *Ly Shew* case, *supra*, is insufficient to support such a finding of fact.

Wong Gook Chun v. Proctor, (C. A. 9) 84 F. 2d 763, 765;

Tillinghast v. Wong Wing (C. A. 1), 33 F. 2d 290.

As a matter of fact, the remarks of the trial Court (T. 177) indicate that the Court did believe the appellant to be the person whom he claimed, but that judgment could not be granted because the evidence did not meet that standard required as expressed in his opinion.

It is asserted that the issue of the relationship of the appellant to his United States citizen father was

to be litigated under the principles and standards applicable generally to other causes of action arising under Federal Law. If the relationship existed, as indicated by the Court, then under the United States statutes which were in effect at the time of his birth he must be deemed to have acquired United States citizenship at the time of birth. It was the power and the duty of the Court under such circumstances then to simply declare by appropriate decree that such citizenship existed. The evidence produced by the appellant was sufficient to establish the existence of the relationship under "reasonable judicial standards". (Chin Hong Yuk v. United States (C. A. 9) 23 F. 2d 174). American citizenship is a most precious right. Its denial should not be allowed to rest upon a doubtful premise. *Machado v. McGrath*, 193 F. 2d 706, Cert. Den. 72 S.Ct. 557.

CONCLUSION.

We submit that the findings of the Court below are "clearly erroneous", and that the judgment should be reversed.

Dated, San Francisco, California,

June 29, 1953.

JACKSON & HERTOGS,

JOSEPH S. HERTOGS,

Attorneys for Appellant.

No. 13,746

IN THE

United States Court of Appeals

For the Ninth Circuit

CHOW SING, by His Guardian ad Litem,
Chow Yit Quong,

Appellant,

VS.

HERBERT BROWNELL, JR., Attorney Gen-
eral of the United States,

Appellee.

APPELLEE'S BRIEF.

LLOYD H. BURKE,
United States Attorney,

CHARLES ELMER COLLETT,
Assistant United States Attorney,
422 Post Office Building,
7th and Mission Streets,
San Francisco 1, California,

Attorneys for Appellee.

MORTON M. LEVINE,

United States Immigration and Naturalization Service,

On the Brief.

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PAUL P. O'BRIEN

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Texts

Hackworth's Digest of International Law, Vol. 3, pp. 435-6	31
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No. 13,746

IN THE

**United States Court of Appeals
For the Ninth Circuit**

CHOW SING, by His Guardian ad Litem,
Chow Yit Quong,

Appellant,

VS.

HERBERT BROWNELL, JR., Attorney Gen-
eral of the United States,

Appellee.

APPELLEE'S BRIEF.

STATEMENT OF THE CASE.

The appellant herein claims to be the son of Chow Yit Quong, alleged to be a citizen of the United States at the time of his birth in China. Paragraphs II, III, and IV of the petition allege:

“II. That the said plaintiff is the true and lawful blood son of Chow Yit Quong, a citizen of the United States; that as evidence of his United States citizenship, Chow Yit Quong holds Certificate of Identity No. 47426 issued September 12, 1923, by the Immigration Service at San Francisco, California;

“III. That the said plaintiff arrived at the Port of San Francisco, State of California, ex SS ‘President Wilson’ on August 23, 1950, seeking admission as a citizen of the United States, such citizenship having been acquired under the provisions of Section 1993, Revised Statutes of the United States, as amended by the Act of May 24, 1934 and Section 201(g) of the Nationality Act of 1940 (8 U.S.C.A. 601(g));

“IV. That the defendant is the duly appointed and acting Attorney General of the United States; that the plaintiff applied to the Immigration and Naturalization Service at San Francisco, State of California, an official executive of the defendant herein, for recognition and admission to the United States as a citizen thereof; that the said Immigration and Naturalization Service at San Francisco, State of California, did on or about the 19th day of October, 1950, deny this plaintiff’s application for admission and recognition as a United States citizen; that the Commissioner, Immigration and Naturalization Service, and the Board of Immigration Appeals, both of Washington, D. C., have affirmed said excluding decision; and that such plaintiff has exhausted his administrative remedies.”

The answer denies the claimed relationship to Chow Yit Quong and denies that appellant is a United States citizen.

After appellant’s arrival at the port of San Francisco he was afforded an administrative hearing, during which he was represented by counsel. His request

for admission into the United States was denied, and after filing an action under 8 U.S.C. 903, trial was had. Following the trial, the Court below found as fact, "It is not true that the permanent residence and domicile of the person who claims to be plaintiff Chow Sing is within the Northern District of California or in the United States of America." The Court also found that the appellant "has failed to introduce evidence of sufficient clarity to satisfy or convince this court that Chow Yit Quong is the natural blood father of the person known as Chow Sing, or that the person who appeared before the court claiming to be plaintiff Chow Sing is in truth and in fact Chow Sing."

From the judgment denying the relief sought the above appeal was taken.

INTRODUCTORY STATEMENT.

On January 12, 1953 Judge Louis E. Goodman ordered judgment for defendant in the case of *Ly Shew v. Acheson*, 110 Fed. Supp. 50, and on the same day ordered judgment for the defendants in *Fong Wone Jing, et al. v. Dulles*, No. 13745 (9th Cir.), and the above case, *Chow Sing v. Brownell*, No. 13746 (9th Cir.). An appeal has been taken in each case. Appellants claim United States citizenship under the provisions of Section 1993, Revised Statutes, as amended (derivative), as alleged children of a United States citizen father. None of the appellants had previously resided in the United States.

In the *Fong Wone Jing* case, the appellants had made application to the American Consul at Hong Kong for documentation “*to proceed to a port of entry in the United States for the purpose of having their admissibility determined by the administrative agency charged with such duty,*” and in the *Ly Shew* case, appellants had made application to the American Consul at Hong Kong “*for permission to enter the United States as a citizen thereof and/or for the purpose of having his claim to citizenship passed upon and adjudicated by the Immigration and Naturalization Service of the United States*”. The consul refused to issue the requested documentation in *Fong Wone Jing* and *Ly Shew*, whereupon suit was instituted under 8 U.S.C. 903 against the Secretary of State.

The application for documentation made to the American Consul at Hong Kong by Chow Sing, appellant herein, was granted, and travel authority in the form of a “Travel Affidavit” was approved. Said affidavit, No. 1427, although not part of the record on appeal, was signed by appellant, who stated in paragraph 8 of the affidavit:

“I execute this affidavit to serve as a travel document in order to facilitate my/our emigration to America, with the understanding that my/our eligibility to enter the United States will be determined by the Immigration and Naturalization Service upon my/our arrival at a port of entry.”

Appellant arrived at the port of San Francisco on August 23, 1950. A Board of Special Inquiry was convened and an administrative hearing was accorded appellant. During the course of the hearing he was at all times represented by counsel. Upon conclusion of the hearing appellant was denied admission to the United States on the ground that he was an *alien immigrant* not in possession of an immigration visa which would enable him to enter the United States for permanent residence. An appeal to the Board of Immigration Appeals was dismissed. A complaint under 8 U.S.C. 903 was thereafter filed in the District Court naming the Attorney General of the United States as defendant.

The claims to citizenship by the appellants in *Fong Wone Jing*, *Ly Shew* and *Chow Sing* herein are similarly founded. It is our intention to incorporate by reference those portions of the *Fong Wone Jing* and *Ly Shew* briefs which we consider pertinent.

STATUTES.

Sec. 503 of the Nationality Act of 1940, 54 Stat. 1171, Title 8 U.S.C. 903.

Sec. 1993, Revised Statutes, as amended by the Act of May 24, 1934, 48 Stat. 797, Title 8 U.S.C. 6.

“§903. Judicial proceedings for declaration of United States nationality in event of denial of rights and privileges as national; certificate of identity pending judgment.

If any person who claims a right or privilege as a national of the United States is denied such right or privilege by any Department or agency or executive official thereof, upon the ground that he is not a national of the United States, such person, regardless of whether he is within the United States or abroad, may institute an action against the head of such Department or agency in the District Court of the United States for the District of Columbia or in the district court of the United States for the district in which such person claims a permanent residence for a judgment declaring him to be a national of the United States. If such person is outside the United States and shall have instituted such an action in court, he may, upon submission of a sworn application showing that the claim of nationality presented in such action is made in good faith and has a substantial basis, obtain from a diplomatic or consular officer of the United States in the foreign country in which he is residing a certificate of identity stating that his nationality status is pending before the court, and may be admitted to the United States with such certificate upon the condition that he shall be subject to deportation in case it shall be decided by the court that he is not a national of the United States. Such certificate of identity shall not be denied solely on the ground that such person has lost a status previously had or acquired as a national of the United States; and from any denial of an application for such certificate the applicant shall be entitled to an appeal to the Secretary of State, who, if he approves the denial, shall state in writing the reasons for his

decision. The Secretary of State, with approval of the Attorney General, shall prescribe rules and regulations for the issuance of certificates of identity as above provided. Oct. 14, 1940, c. 876, Title I, Subchap. V, § 503, 54 Stat. 1171."

Sec. 1993, Revised Statutes.

"All children heretofore born or hereafter born out of the limits and jurisdiction of the United States, whose fathers were or may be at the time of their birth citizens thereof, are declared to be citizens of the United States, but the rights of citizenship shall not descend to children whose fathers never resided in the United States."

Act May 24, 1934—48 Stat. 797.

"Citizenship of Children Born Abroad of Citizen Fathers (Acts of April 14, 1802, and February 10, 1855, as amended by Act of May 24, 1934).

"Sec. 1993. Any child hereafter born out of the limits and jurisdiction of the United States, whose father or mother or both at the time of the birth of such child is a citizen of the United States, is declared to be a citizen of the United States; but the rights of citizenship shall not descend to any such child unless the citizen father or citizen mother, as the case may be, has resided in the United States previous to the birth of such child. In cases where one of the parents is an alien, the right of citizenship shall not descend unless the child comes to the United States and resides therein for at least five years continuously immediately previous to his eighteenth birthday,

and unless, within six months after the child's twenty-first birthday, he or she shall take an oath of allegiance to the United States of America as prescribed by the Bureau of Naturalization. (Sec. 1, Act of May 24, 1934, 48 Stat. 797; 8 U.S.C. 6.)”

QUESTIONS PRESENTED.

Appellant asserts (Tr. p. 6) the sole issue is whether appellant is the son of a recognized United States citizen. Although there are five specifications of error, the question is stated singly as whether the lower Court's findings are “clearly erroneous.” Specifications 1, 2, 3, and 5 are embodied within the single question.

Specification 4 cites error in finding that plaintiff-appellant did not have a claim to permanent residence within the Northern District of California or in the United States of America.

Does the Court have jurisdiction of the appellant's claim under 8 U.S.C. 903?

A. Appellant had not resided in the United States prior to making his claim;

B. There was no denial of a “right or privilege” within the meaning of Section 903;

C. The only judicial remedy available to appellant is habeas corpus.

ARGUMENT.

I. JURISDICTION.

Although appellant herein did specify as error in the District Court the finding that appellant did not have a claim to residence, the question of jurisdiction has been completely ignored. Quoting from the opinion of Judge Goodman in *Ly Shew v. Acheson*,

“It has been blithely assumed that plaintiffs, who have never been in the United States and who have lived their lives as Chinese, have the status and right to avail themselves of Section 903.”

- A. Appellant had no residence in the United States upon which to found a claim of “permanent residence” in that he had never previously been in the United States.**

Pages 8 to 38 of appellee’s brief in *Fong Wone Jing* and pages 5 to 16 of appellee’s brief in *Ly Shew* filed in this Court as related to the availability of Section 903 to persons who have never been in the United States are incorporated herein and made a part of this brief.

- B. There was no denial of a right or privilege within the meaning of Section 903.**

The exclusion of appellant by Immigration is not a denial of right or privilege of a national on the ground that he is not a national, but a determination that the individual is an alien.

Reference is again made to appellee’s briefs in the *Fong Wone Jing* and *Ly Shew* cases which have been incorporated herein.

Since the filing of the aforesaid briefs Judge Westover has filed a memorandum opinion in four cases in the Southern District which will probably be appealed to this Court, *Wong Wing Sloo v. Dulles*, No. 14,742-HW; *Wong Fay Poo, etc. v. Dulles*, No. 14,761-HW; *Wong Doon Loy v. Dulles*, No. 14,864-HW, and *Chin Kwong Hing v. Dulles*, No. 14,980-HW. The four cases were set for a pre-trial hearing upon the sole issues of jurisdiction. The "certified passport files" were presented to the Court by the United States Attorney and offered in evidence. Over the objection of plaintiffs, the Court admitted them for the limited purpose of ascertaining whether plaintiffs and/or either of them "have been denied any right or privilege as nationals of the United States on the ground that they were not such nationals." The four cases were dismissed for want of jurisdiction; *Wong Doon Loy* for failure to establish right to passport privilege under requirements; *Chin Kwong Hing* in that the denial was on the ground that the claim of parentage was fraudulent; *Wong Fay Poo* in that the denial was on the ground that he failed to verify the facts alleged in his application. *Wong Wing Sloo* in that the denial was on the ground that he failed to establish the identity alleged. The opinion is made a part hereof as Appendix A.

C. Appellant's sole remedy is by way of habeas corpus.

Justice Holmes in *United States v. Sing Tuck* (1904), 194 U.S. 161, held:

“We are of the opinion, however, that the words quoted (‘in every case where an *alien* is excluded * * * the decision of the appropriate immigration or customs officers * * * shall be final, unless reversed on appeal * * *’) *apply to a decision on the question of citizenship * * **” (Emphasis and words in parentheses ours.)

In *Quon Quon Poy v. Johnson*, 273 U.S. 352, Mr. Justice Sanford stated at page 358:

“It is clear, however, in the light of the previous decisions of this court, that when the petitioner, *who had never resided in the United States, presented himself at its border for admission, the mere fact that he claimed to be a citizen did not entitle him under the Constitution to a judicial hearing.*” (Emphasis ours.)

The Courts through the years have been consistent in holding that the only judicial review of immigration proceedings is by way of habeas corpus.

Citizenship claims:

U. S. v. Jung Ah Lung, 124 U.S. 621;
Chin Yow v. U. S., 208 U.S. 8;
Kwock Jan Fat v. White, 253 U.S. 454;
Ng Fung Ho v. White, 259 U.S. 276.

Aliens:

Bilokumsky v. Tod, 263 U.S. 149;
Tisi v. Tod, 264 U.S. 131;
Vajtauer v. Comm. Imm., 273 U.S. 103, 106;
Bridges v. Wixon, 326 U.S. 135, 167;
Heikkila v. Barber, 345 U.S. 229.

The case of *Heikkila v. Barber*, supra, involved the question of the judicial remedy available to an *alien* whom Immigration sought to deport (expulsion). Heikkila contended that since the Administrative Procedure Act the Courts could review deportation orders by way of declaratory judgment or review of agency action. The government maintained that the only remedy available was habeas corpus. The Supreme Court in interpreting the "finality" of the Attorney General's decisions reviewed the history of immigration legislation, both in the statutes and in the decisions of the Supreme Court. At page 4 the Supreme Court said:

"It begins with § 8 of the Immigration Act of 1891, 26 Stat. 1086, which provided in part that 'All decisions made by the inspection officers or their assistants touching the *right of any alien to land*, when adverse to such right, shall be final unless appeal be taken to the superintendent of immigration, whose action shall be subject to review by the Secretary of the Treasury.' The appellant in *Ekiu v. United States*, 142 U.S. 651 (1892) argued that if § 8 was interpreted as making the administrative exclusion decision conclusive, she was deprived of a constitutional right to have the courts on habeas corpus determine the legality of her detention and, incidental thereto, examine the facts on which it was based. Relying on the peculiarly political nature of the legislative power over aliens, the Court was clear on the power of Congress to entrust the final determination of the facts in such cases to executive officers. Cf. *Harisiades v. Shaughnessy*, 342 U.S. 580

(1952). Mr. Justice Gray found that § 8 was 'manifestly intended to prevent the question of an alien immigrant's right to land, when once decided adversely by an inspector, acting within the jurisdiction conferred upon him, from being impeached or reviewed, in the courts or otherwise, save only by appeal to the inspector's official superiors, and in accordance with the provisions of the Act.' 142 U.S., at 664. With changes unimportant here, this finality provision was carried forward in later immigration legislation. See, e.g., § 25 of the 1903 Act, 32 Stat. 1220, and § 25 of the 1907 Act, 34 Stat. 906. *During these years, the cases continued to recognize that Congress had intended to make these administrative decisions nonreviewable to the fullest extent possible under the Constitution.* Fong Yue Ting v. United States, 149 U.S. 698 (1893). In *Lem Moon Sing v. United States*, 158 U.S. 538 (1895), *treating a comparable provision for the enforcement of the Chinese Exclusion Act, Mr. Justice Harlan observed that when Congress made the administrative decision final, 'the authority of the courts to review the decision of the executive officers was taken away.'* Ibid., at 549. And by 1901, Chief Justice Fuller was able to describe as '*for many years the recognized and declared policy of the country*' the congressional decision to place '*the final determination of the right to admission in executive officers, without judicial intervention.*' Fok Young Yo v. United States, 185 U.S. 296, 305 (1902). See also the Japanese Immigrant case (*Yamataya v. Fisher*), 189 U.S. 86 (1903); *Pearson v. Williams*, 202 U.S. 281 (1906); *Zakon-aite v. Wolfe*, 226 U. S. 272 (1912).

“Read against this background of a quarter of a century of consistent judicial interpretation, § 19 of the 1917 Immigration Act, 39 Stat. 890 clearly had the effect of precluding judicial intervention in deportation cases except in so far as it was required by the Constitution.⁹ And the decisions have continued to regard this point as settled. *Kessler v. Strecker*, 307 U.S. 22, 34 (1939); *Bridges v. Wixon*, 326 U.S. 135, 149, 166, 167 (1945); *Estep v. United States*, 327 U.S. 114, 122, 123, n. 14 (1946); *Sunal v. Large*, 332 U.S. 174, 177, n. 3 (1947). Clearer evidence that for present purposes the *Immigration Act of 1917 is a statute precluding judicial review would be hard to imagine.*” (Italics ours.)

In the case at bar, appellant was found by Immigration to be an alien. His admission into the United States was denied for lack of possession of proper documents. The authority of Immigration Service to so find was established by the Supreme Court in *Sing Tuck and Quon Quon Poy*. See also *Florentine v. Landon*, 206 F.2d 870 (9th Cir. Aug. 27, 1953). As an alien, appellant is entitled *only* to habeas corpus.

⁹“The Senate Committee said, ‘The last (finality) provision, while new in this particular location, is not new in the law, the courts having repeatedly held that in the cases of aliens arrested for deportation, *as well as in the cases of those excluded at our ports*, the decision of the administrative officers is final, and the Supreme Court having in several decisions regarded the case of the alien arrested for deportation as practically a deferred exclusion (The Japanese Immigrant Case, 189 U.S. 86; *Pearson v. Williams*, 202 U.S. 281).’ S. Rep. No. 352, 64th Cong., 1st Sess., Vol. 2, 16.

II. THE FINDINGS OF FACT AND CONCLUSIONS OF LAW AND JUDGMENT ARE CORRECT.

At page 6 of his brief appellant concludes that the sole issue in the proceeding is whether appellant is the son of a recognized United States citizen and cites the cases of *Gung You v. Nagle*, 34 F.2d 848, 851 (9th Cir.), *Quan Toon Jung v. Bonham*, 119 F.2d 915, 916 (9th Cir.), and *Yep Suey Ning v. Berkshire*, 73 F.2d 745, 746 (9th Cir.). Inherent in the question of relationship is the matter of identity. Who is the person who claims to be the son of a citizen father? The assertion by a United States citizen of the Chinese race, upon return from a visit to China, that he had married a Chinese woman and that a son was born in China establishes the basis for a Chinese person at a later date to claim to be that son. Whether or not such a birth occurred is not subject to disproof—only proof can be required. Whether or not the person who makes the claim is that son is likewise only subject to the presentation of adequate proof.

The cases of *Acheson v. Yee King Gee*, 184 F.2d 382; *Wong Gan Chee v. Acheson*, 95 F. Supp. 815; and *Toy Teung Kwong v. Acheson*, 97 F.Supp. 745 (erroneously cited as 95 F. Supp.), are cited at page 7 of appellant's brief as authority for his statement that:

“The claim to United States citizenship having been established, the appellant is entitled to a declaratory judgment of United States nationality.”

In each of these three cases the *relationship* of the plaintiffs to the putative father *was conceded* and the sole question before the Court was whether the father had sufficient residence in the United States to comply with the statute and to thus confer citizenship on their children. The claim to citizenship referred to by the Court in each of the three cases was that of the fathers, and not the claim of the alleged children. From page 7 of appellant's brief the following is quoted:

"The Court below in giving judgment against this appellant filed no opinion, but set forth in its memorandum order for judgment (T. 21) that the evidence presented by the appellant did not conform to the standards enunciated in the opinion filed the same day by the same Judge in the case of *Ly Shew v. Acheson*, 110 Fed. Supp. 50.

"We submit that the principles laid down by the lower Court in the *Ly Shew* decision, *supra*, are contradictory to the normal degree of proof required in proceedings of this nature. It is a generally recognized rule of law that in civil cases the party having the burden of proof must establish the ultimate facts by a preponderance of the evidence."

Referring again to the contention of appellants in *Fong Wone Jing* and *Ly Shew* in conjunction with the above quoted contention, it should be clear to this Court that the proposition sought to be sustained by all counsel in these cases is: *The assertion under oath in the District Court by the claimant and the*

alleged parent that they are parent and child establishes a preponderance of the evidence sufficient to sustain the burden of proof and the defense must move forward to disprove the claim. In immigration proceedings this contention has been extremely successful. The small number of cases that have been brought to the Court by way of habeas corpus well testifies to this success. The record in none of these cases, however, discloses the number of claimants who have been admitted to the United States as nationals upon proof, or rather absence of proof, that would arouse a true citizen to alarm. Many of the judges have become aware of the aura of fraud that surrounds these claims.

(1) Judge Hanford in *Gee Fook Sing v. U. S.*, 49 F. 146.

(2) Judge Hawley in *Lee Sing Far v. U. S.*, 94 F. 834.

(3) Justice Holmes in *U. S. v. Sing Tuck*, 194 U.S. 161.

(4) Justice Field in *The Chinese Exclusion Case*, 130 U.S. 581.

(5) Judge Bourquin in *Ex parte Jew You On*, 16 F.2d 153.

(6) Judge Rudkin in *Lee Sai Wing v. U. S.*, 29 F. 2d 108;

(7) Judge Lemmon in *Fong Ging Hung v. Acheson* (unreported), Civil Docket No. 6599.

(8) Judge Goodman in *Ly Shew v. Acheson*, *supra*.

(9) Judge Westover in *Mar Gong v. McGranery*, 109 F. Supp. 821.

The extraordinary position of the Secretary of State as defendant in the 903 action because a consul in Hong Kong had no conceivable basis upon which to identify thousands of Chinese who claimed to be citizens has been explored in *Fong Wone Jing* and *Ly Shew*.

What is the position of a Board of Special Inquiry? Certainly we cannot disagree with Judge Goodman that "We do not pass it (American citizenship) out on a platter."

In *Go Lun v. Nagle*, 22 F.2d 246; *Gung You v. Nagle*, 34 F.2d 848; and *Quan Toon Jung v. Bonham*, 119 F.2d 915, and any number of other cases this Court reviewed the proceedings of the Immigration Service on an appeal from a denial of the application for the writ of habeas corpus in the District Court. These cases are in Group 7 as distinguished on page 18 of the *Fong Wone Jing* brief.

"(7) Persons who for the first time were seeking entry into the United States as citizens through derivation and who were denied admission to the United States by the Immigration Service."

Quon Quon Poy v. Johnson, *supra*, is the controlling Supreme Court decision.

In each of these cases a Chinese, fresh from China, who had spent all of his life in China, who had never been in the United States, says I am a citizen of the United States because I am the son of Wing Doe who is a citizen. Considering the "inestimable heritage of citizenship" which Justice Fuller in *Chan Bak Kan v. U. S.*, 186 U.S. 193 says "is not to be conceded to those who seek to avail themselves of it under pressure of a particular exigency, without being able to show it was ever possessed.", what proof must be produced to justify any official or judge to say this man is a national or citizen of the United States? By some undisclosed process the Immigration Service was led into the position of assuming the burden to disprove the claim, and to thereby embark on an extensive interrogation of the witnesses having as its purpose the production of discrepancies. That all of the persons appearing as witnesses were "well coached" was well known to Immigration. The interception of numerous "transcripts" of the testimony to be memorized by each witness had conclusively established this fact. The attitude of mind of the examiner was obviously influenced by this knowledge and his purpose was to disclose discrepancies by breaking through the "story".

The objective is to probe an area where there may have been no preparation. The process is obviously tortuous, prolonged and seemingly exceedingly irrelevant as to the testimony adduced. Our question is still what proof is to be produced by the claimant?

Judge Bourquin was very clear on the question in *Ex parte Jew You On*, 16 F.2d 153, 154 (1926), when he said:

“It is argued that, if the bare oath of two or three Chinese or other persons is not accepted, Chinese American citizens procreated in China will be barred from this country of their father’s nativity. The answer is the responsibility is not the immigration officers’ nor the court’s. Like any case, the burden is the proponent’s to prove it. Perhaps not unfamiliar registry systems might be adopted. Otherwise, this country is helpless, the exclusion policy futile, and the Chinese admitted will be limited solely by the extent there is courage to take advantage of opportunity.”

Judge Garrecht in *Mui Sam Hun v. U. S.*, 78 F.2d 612, 615, stated:

“The rule is not, as appellant contends that the applicant need only make out his case by a fair preponderance of the evidence, for it is not incumbent upon the government to offer any evidence whatsoever. Rather, the burden is upon the applicant to prove his right to admission and the Board is the sole judge of credibility of the witnesses, and its finding will not be disturbed without a showing that the hearing was unfair and unreasonable, or that the finding was arbitrary or capricious. The weight of the evidence and the credibility of witnesses is not for us, but for the Board.”

With the above in mind let us turn to Judge Healy’s opinion in *Quan Toon Jung v. Bonham*, *supra*, p. 919:

“Aside from the single item of the 1924 landing certificate, the showing of paternity was persuasive. On the occasion of Quan Siew’s various other landings and departures the information given by him concerning the appellant and his other children squares with the present testimony. There were slight discrepancies, of course, as in the phonetic spelling of names, but these were not significant, and are readily explainable. *The testimony of the applicant and of the alleged father in support of the relationship is of such character as to compel belief.* On the great mass of intimate details testified to their accounts are confessedly in substantial agreement. There is no evidence of coaching, as the board of review concedes; and indeed coaching sufficient to produce the results obtained here would have been virtually impossible. Quan Siew and the boy had not seen each other in seven years and at the time of the inquiry they were separated by a distance of a thousand miles. If it were permissible to judge from their photographs it would be seen that the two so closely resemble each other as to further substantiate the belief that they are father and son.” (Emphasis ours.)

The evidence submitted was in the familiar pattern —“I am the son”—“I am the father”, followed by the belated attempt of the examiner by extensive interrogation to uncover a discrepancy.

Judge Bourquin’s remarks at page 154 of *Ex parte Jew You On* are illuminating:

“In endeavor to avoid the usurpation (judicial invasion of executive domain), the immigration

authorities have invented a more or less absurd rule of 'discrepancies'. That is by examination of immigrant and witnesses to develop contradictions, often collateral and trivial in character, and by reason of these to justify that which needs none—their disbelief of the immigrant's witnesses before them."

But to return to *Quan Toon Jung*, Judge Healy says the photograph of Leong Sing and Quon Siew are slender evidence of identity and that the Bureau at Washington was right in rejecting it. But says the judge, the examination of the photograph of Quon Siew and the boy affords further substantiation for the belief that they are father and son.

Judge Healy says there is substantial agreement on the great mass of intimate details testified to in their accounts.

Judge Roche in *Lee Mon Hong v. Brownell*, No. 13,957 in this Court has said "Had he (the plaintiff) been letter perfect in his answers to all the examiner's questions the Court might be more inclined to believe him an imposter reciting memorized material."

Judge Goodman in *Ly Shew v. Dulles*, *supra*, has specifically stated his trouble:

"The testimony at the trial, which lasted three days, was entirely given in the Toy Shaw Chinese dialect and interpreted into English. Neither Ly Shew, the alleged father, nor the plaintiffs, nor the witnesses in behalf of plaintiff, could speak a word of English.

“Many times the interpreter carried on extensive dialogues with the witness before obtaining a response to a question propounded. Inconsistencies and contradictions in testimony became manifest. To fairly determine their effect is difficult if not impossible. Familiar as we are in this court with Chinese interpreted testimony, it can be categorically stated that it is well-nigh impossible to determine the credibility of such witnesses, at least after ten years of constant trial work, I find it so.”

Judge Healy, in *Quan Toon Jung*, had no difficulty in reading a cold record, with no interpreter problem, and in reaching the conclusion that “the testimony of the applicant and of the alleged father in support of the relationship is of such character as to compel belief.” It appears to us that the case had a strong aroma of fraud. Immigration and the Court below had had no trouble detecting it.

The cases of

Ex parte Cheung Tung (D.C., Wash.), 292 F. 997, 1000;

Ex parte Delaney, 72 F. Supp. (erroneously cited as 77 F. Supp.) 312, 322, affirmed 9 Cir., 170 F.2d 239;

Lilienthal's Tobacco v. U. S., 97 U.S. 237, 24 L. Ed. 901, 905,

cited by appellant, do not support his “preponderance of the evidence” contention. Judge Dietrich in *Cheung Tung* is quoted by appellant (Tr. p. 7). This statement is ambiguous. Did the judge mean additional

conclusive evidence, or that the conclusive evidence should be more conclusive? We think the judge usurped the function of immigration and substituted his opinion in a manner contrary to *Quon Quon Poy v. Johnson*. The following quote from page 1000 is interesting:

“But upon the essential features the witnesses, testifying separate and apart one from the other and without assistance or guidance of counsel, are substantially in harmony; *indeed, greater harmony would be suggestive of collusion*”. (Emphasis ours.)

Perhaps we are approaching a rule of greater or lesser harmony.

Ex parte Delaney and *Lilienthal's Tabacco* are not in point.

Appellant, at page 13 of his brief, submits that he has made a *prima facie* case, that the burden of going forward consequently shifts to the defendant, that since defendant presented no evidence, it failed to carry its burden, and judgment should be for appellant.

This Court in *Wong Kam Chong v. United States*, 111 F.2d 707, 712, discussed the question of burden of proof and stated:

“Burden of proof in one sense means the duty to establish a certain fact by a certain degree of proof, such as a preponderance of the evidence, clear and convincing evidence, or beyond a reasonable doubt. In another sense it means the

duty to offer evidence or the duty to go forward with the evidence.”

Where, as here, the evidence is solely within the possession of appellant, the reasoning of counsel for appellant begs the question as to the duty of going forward and what constitutes a *prima facie* case in this sort of proceeding. Whether or not the showing made is *prima facie* depends upon the nature and extent of the burden of proof.

The Courts of the United States have recognized the great difficulty confronting them as well as the Immigration Service in cases involving claims to United States citizenship.

In *Chan Bak Kan v. United States*, 186 U.S. 193 (1902) the Supreme Court stated:

“The facts on which such a claim (assertion of citizenship) is rested must be made to appear. And the inestimable heritage of citizenship is not to be conceded to those who seek to avail themselves under pressure of a particular exigency, without being able to show that it was ever possessed.” (Words in parenthesis ours.)

This Court in *Lee Sing Far v. United States*, 94 Fed. 834 (C.A. 9) recognizing the problem stated at page 837:

“It is safe to say that the United States is powerless to make any proof in any case as to the place of birth of Chinese children. In the very nature of the case it would as a general rule be impossible to do so.”

Reference is made to the *Fong Wone Jing* brief, pages 38 to 62.

In *Ex parte Lung Wing Wun*, 161 Fed. 211, 212, 213, decided in 1908, the Court stated:

“There is a natural presumption that a person of the Mongolian race coming to this country from China, is an alien; and to overcome that presumption, and secure recognition of the rights, privileges, and immunities pertaining to citizenship, *convincing evidence is essential * * *.*”

The 2nd Circuit expressed this view in *Lee Sim v. United States*, 218 Fed. 432 at page 435:

“In these deportation proceedings there is a natural presumption that a person of the Mongolian race is an alien and it is essential that the evidence to overcome it and to show that the man is entitled to the privileges of citizenship in the United States should be *clear and convincing.*” (Emphasis ours.)

See also:

Ex parte Chin Him, et al., 227 Fed. 131, 133.

Of the four cases cited above, the first two involved exclusion of persons claiming United States citizenship and the other two involved deportation of persons claiming United States citizenship.

Judge Garrecht, speaking for this Court in *Mui Sam Hun v. U. S.*, 78 F.2d 612, in an opinion subscribed to by Judges Wilbur and Denman without dissent, at page 615 said:

“The rule is not, as appellant contends, that the applicant need only make out his case by a fair

preponderance of the evidence, for it is not incumbent upon the government to offer any evidence whatsoever. Rather, the burden is upon the applicant to prove his right to admission and the Board is the sole judge of credibility of the witnesses, and its finding will not be disturbed without a showing that the hearing was unfair and unreasonable, or that the finding was arbitrary and capricious. The weight of the evidence and the credibility of witnesses is not for us, but for the Board.”

Mui Sam Hun was a claimant to native birth.

Judge Goodman in the *Ly Shew* case recognized the rule that proof of alleged citizenship must be clear and convincing and at page 58 stated:

“Clear and convincing proof is a standard frequently imposed in civil cases where the wisdom of experience has demonstrated the need for greater certainty.¹⁵ This high standard may be required to sustain claims which have serious social consequences or harsh or far-reaching effects on individuals.¹⁶ To justify an exceptional

¹⁵IX Wigmore on Evidence § 2498 at page 329 (3d Ed. 1940); 32 C.J.S. Evidence, § 1023 (1942); 20 American Jurisprudence, Evidence, §§ 1252-1253 (1939).

¹⁶E.g. note, 128 A.L.R. 713 (1940) (degree of proof to establish the illegitimacy of children born in wedlock); Note, 13 Minnesota Law Review 580 (1929) (proof of adultery in divorce actions); Note, 12 A.L.R. 2d 153 (1950) (showing necessary for rescission of divorce decree after remarriage); Commissioner of Public Welfare v. Ryan, 1933, 238 App. Div. 607, 265 N.Y.S. 286 (proof in filiation proceeding); Johnson v. Feskens, 1934, 146 Or. 657, 31 P. 2d 667, 107 A.L.R. 340 (proof to justify forfeiture under a contract); Dickson v. St. Louis & K. R. Co., 1902, 168 Mo. 90, 67 S.W. 642 (to divest title to real estate for breach of a condition subsequent).

judicial remedy¹⁷ or to circumvent established legal safeguards,¹⁸ the proof must usually meet this standard. Instruments which have established legal rights and warrant great reliance may not be contradicted except by this degree of proof.¹⁹ As well, this standard is employed in cases where the opportunity for fraud and the temptation to perjury is great. Thus, this standard must be met to sustain certain claims which are easily fabricated and difficult to disprove, or which are evidenced merely by the oral testimony of interested witnesses as to events long past.²⁰

Judge Dal M. Lemmon, in *Fong Ging Hun v. Acheson*, Civil No. 6599, and *Fong Shew Sen v.*

¹⁷E.g. 49 American Jurisprudence, Specific Performance, § 169 (1943) (proof of the existence of a contract when specific performance is demanded).

¹⁸E.g. 1 American Jurisprudence, Acknowledgement, § 155 (1936) (to impeach an acknowledgement).

¹⁹36 Am. Jur., Mortgages, §§ 134-135 (1941); Note, L.R.A. 1916B, 192 (to show an absolute deed is a mortgage); 9 Am. Jur., Cancellation of Instruments, § 63 (1937); 45 Am. Jur., Reformation of Instruments, §§ 116-117 (1943); Note, 94 A.L.R. 1278 (1935); Note, 48 A.L.R. 1462 (1927); 117 A.L.R. 1022 (1938) (to justify reformation or rescission of a written instrument for fraud, mistake, or undue influence).

²⁰E.g. 57 Am. Jur., Wills, §§ 981-983 (1948) (to prove a lost will); 57 Am. Jur., Wills § 728 (1948); Note, 69 A.L.R. 167 (1930) (to prove agreement to leave property to another); Note, 7 A.L.R. 2d 25 (1949) (proof of agreement for compensation for services rendered to a relative); 24 Am. Jur., Gifts, § 133 (1933) (to prove a parol gift after the death of the donor); 54 Am. Jur., Trusts, §§ 620-624 (1945); 23 A.L.R. 1500 (1923) (oral proof of an express trust in realty or personalty, or of facts giving rise to a resulting or constructive trust); *Furman v. St. Louis Union Trust Co.*, 1936, 338 Mo. 884, 92 S.W. 2d 726 (proof of agreement to adopt as basis for sustaining right to inheritance); *The Barbed Wire Patent* (*Washburn & Moen Mfg. Co. v. Beat 'Em All Barb-Wire Co.*), 1892, 143 U.S. 275 at page 284, 12 S.Ct. 443, 36 L. Ed. 154 (to prove prior anticipatory use of an invention); *Commissioner of Public Welfare v. Ryan*, 1933, 238 App. Div. 607, 265 N.Y.S. 286 (proof in filiation proceedings).

Acheson, Civil No. 6629 (December 10, 1952, unreported), recognized the rule and stated:

“Courts should act with much care and circumspection in this type of case (complaints filed under Sec. 903). Experience has proven that many frauds have been resorted to in order that Chinese nationals might gain admission to this country. Consequently certain rules have been developed which are singularly applicable to cases of this kind. The presumption is that a person of the Chinese race coming to this country from China is an alien and the burden of overcoming this presumption is *not* met by a *mere preponderance* of evidence. *The evidence must be ‘clear and convincing.’* In determining whether that test is met the court may and should consider the interest of the witnesses since the witnesses are usually ‘interested’.” (Parentheses and emphasis ours.)

So far we have been concerned with habeas corpus after completion of immigration procedure. The case herein is filed under 8 U.S.C. 903 as an entirely new proceeding, although there had been a Board of Special Inquiry hearing and an appeal to the Board of Immigration Appeals. The asserted authority is *Mah Ying Og v. Clark*, 81 F. Supp. 696, 187 F.2d 199, *Gan Seow Tung v. Clark*, 83 F. Supp. 482. Reference is here made to the *Fong Wone Jing* brief, pp. 28-38, and the discussion of these cases therein.

The contention is that the trial is *de novo* and that the record of the immigration proceedings is not admissible in evidence except possibly for impeachment

purposes. (Tr. pp. 117-118, 150, 151.) That there is confusion is demonstrated by the decision of this Court in *Wong Wing Foo v. McGrath*, 196 F.2d 120. Judge Denman, in the original opinion filed February 14, 1952, after first reciting that the appeal was from a judgment in a suit for declaratory judgment in which the Court had held appellant to be an alien, and that a Board of Special Inquiry had previously found that appellant was not the son of Wong Yem, the alleged father, which finding had been affirmed by the Board of Immigration Appeals, concluded:

“The district court properly held that the issue in the suit before it required a trial de novo.”

The decision then held that the testimony of a witness, Wong Gong, produced by the appellant at the Board of Special Inquiry hearing but not produced at the trial “was not before the Court merely because it was taken in the proceeding before the board of special inquiry.”

“It is apparent from the entire record of this case and from the use made by the district court of the copy of Wong Gong’s testimony that the plaintiff was seriously prejudiced thereby.”

The judgment was reversed and remanded. A petition for a rehearing was filed and the Court’s attention was called to meaning of “trial de novo”, that it is a hearing upon the record plus such additional evidence as the appellant may present. Judge Denman thereafter filed an amended opinion on April 28, 1952 which recites that plaintiff-appellant,

“upon presenting a *passport* from the American Consul General at Hong Kong was denied his claimed right as an American citizen to enter at once and was held in detention by the immigration authorities. Instead of filing at once the instant suit under § 903 he waited until after immigration authorities had determined in a proceeding under 8 U.S.C. § 503 before a board of special inquiry that he was not the son of Wong Yen.” (Emphasis ours.)

And further:

“We can find nothing in the language of § 903 warranting treating the action there provided as anything other than an *independent action* which plaintiff could have brought as soon as the immigration officials refused to accept his passport and to allow him to enter.” (Emphasis ours.)

Was this a confession and avoidance? The issue presented was avoided by holding that the proceeding under § 903 was an “independent action” because of the “passport.”

But a passport is not evidence of citizenship.

Urtetiqui v. D’Arcy, 34 U.S. 692;

Edsell v. Mark (9th Cir.), 179 F. 292;

Miller v. Senjin, 289 F. 388;

Hackworth’s Digest of International Law, Vol. 3, pp. 435-36;

Fong Wone Jing brief, pp. 8-18.

The practice commented upon by Judge Hawley in *Lee Sing Far v. U. S.*, 94 F. 834 (9th Cir. 1899), is particularly pertinent at this point. The judge com-

mented on a not uncommon practice in Chinese cases for counsel not to take any exception to the report of the referee, then after entry of the judgment by the District Court, to substitute attorneys, who then come into Court claiming inadvertence, oversight and neglect and ask for a rehearing which is granted enabling the applicant to supply the "missing link" in the evidence. The judge said "such procedure * * * does not commend itself to our favor."

According to *Wong Wing Foo* such procedure is not only commended but has judicial benediction.

On August 27, 1953 Judge Denman filed an opinion in *Florentine v. Landon*, 206 F.2d 870. In it he says:

"There is no merit to Florentine's claim that the fact that he is claiming United States citizenship gives him a right to institute this habeas corpus proceeding without regard to the status of the administrative proceeding. * * *"

"No special circumstances exist why the orderly way provided by Congress to raise the fundamental question of citizenship through the administrative proceeding should not be pursued. * * * Even where a person claiming citizenship is permitted to bring an action for declaratory relief in order to determine citizenship, the administrative remedies must first be exhausted."

See also:

Ng Yip Yee v. Barber, No. 14096 in this Court, decided Dec. 24, 1953.

THE EVIDENCE.

After discussing on pages 8-12 the evidence presented at the trial, appellant at page 14 of his brief states:

“The appellant introduced for the Court’s consideration the best available evidence. This evidence presented was stronger than that necessary to establish a *prima facie* showing of the claimed relationship, and unless this affirmative showing is rebutted it is sufficient to warrant judgment in appellant’s favor.

“When no contradictory evidence is offered, unsupported allegations are not sufficient to overcome the *prima facie* showing.”

And cites:

Wong Kam Chong v. United States, 111 F.2d 707;

Leong Kwai Yin v. United States, 9 Cir., 31 F. 738;

Fong Lum Kwai v. United States, 9 Cir., 49 F.2d 19;

Lee Choy v. United States, 9 Cir., 49 F.2d 24.

Each of the aforesaid cases involved deportation (expulsion) of one who had *previously* been admitted to the United States as a native born citizen and to whom Immigration had issued a certificate of identity. This circuit has long held that a certificate of identity is *prima facie* evidence of the right of the holder to be and remain in the United States, and it was in this connection that this circuit in each of the four cases

cited by appellant held that unsupported allegations are not sufficient to overcome the *prima facie* showing. Such statement has no application to the case at bar and the cases are cited entirely out of context with the instant proceeding.

At the trial in the Court below, appellant testified to his relationship to his purported father, Chow Yit Quong, and presented as witnesses Chow Yit Quong; Chow Sam, a purported brother; and So Tak, a friend. In addition he submitted in evidence two photographs, income tax statements for the years 1942-1945, and a certified copy of Selective Service questionnaire.

Administrative hearings were afforded appellant during the course of which he and his alleged father were interrogated. The transcripts of their testimony were admitted in evidence as Defendant's Exhibits A and C "to the extent that they are impeaching" (Tr. p. 150). A number of "discrepancies" were developed in said testimony. They are set forth in the "Interrogatories to adverse party" and the "answers to interrogatories" which were also admitted into evidence (Tr. p. 116).

The direct testimony of appellant and his alleged father carefully avoided the said "discrepancies"—at least they are not there. The effect of the administrative hearings was to permit a "trial run" on the claim and to afford opportunity to supply the "missing link" to quote Judge Hawley in *Lee Sing Far v. U. S.*, *supra*.

Some of the inconsistencies are as follows:

1. *At the trial appellant testified that he saw his father's second wife for the first time in the home village of Kwangtung Po* (Tr. p. 115).

1(a) Appellant admits that at Immigration he stated that he met his father's second wife for the first time in Canton City on the day of the marriage (Tr. p. 9, Interrog. No. 4).

2. In the Court below appellant stated he was *not present* at his father's wedding feast in Canton City (Tr. p. 115),

2(a) but admits that at Immigration his testimony was that he *did attend* the wedding feast at Canton City and described the restaurant in which the feast took place and who attended (Tr. p. 9, Interrog. No. 4).

3. Appellant testified before the Court that he had resided in Kwangtung Po village for two weeks in 1947 and also when he was very small (Tr. p. 116).

3(a) He admitted making the statements on page 3 of the hearing record (Tr. p. 10) but stated he didn't make the statements on page 6 of the hearing (Tr. p. 11) which reflects that appellant stated he had *never* been in Kwangtung Po village.

4. At pages 126, 127 of the transcript appellant testified that his father had one brother, Chow Sing Quong, who had some children but didn't know how many. He named two and stated he slept in the same house with them.

4(a) Appellant admits that before Immigration he testified that he *never saw* any of his uncle's

children and did not know any of their names (Tr. pp. 13 and 14, Interrog. No. 10).

5. Appellant testified his mother died in *Kwangtung Po village* in 1913 (Tr. pp. 127, 128),

5(a) Admits telling Immigration that his mother died in the city of Macao (Tr. pp. 14 and 15, Interrog. No. 11).

The above are only a few of the inconsistencies between appellant's testimony before the Court below as compared to that before Immigration.

The alleged father, Chow Yit Quong, claimed to have come from China to the United States in 1923. After 20 years he could not speak or understand the English language sufficiently to do without an interpreter. He was unable to state the birth dates of any of the other six children he claimed to have fathered with his first wife. Exhibit No. 2 is a photograph of two small children whom the witness identified as the likeness of appellant and a deceased daughter, Chow Suey (Tr. pp. 49-50). He stated the photograph was taken in 1938 after he had returned to the United States and that it had been sent to him. However, at page 39 of the transcript he testified that he had not returned to the United States until March 11, 1939. In this connection, although the witness claimed to have had the photograph, Exhibit No. 2, in his possession on his last return to the United States in 1950 (Tr. p. 50) he did not present the photograph or any of the other exhibits to Immigration (Tr. p. 80).

The alleged brother, Chow Sam, came to the United States in 1940 and could not have seen appellant until 1950. The witness, So Tak, saw appellant for the first time in 1947. Chow Sam testified (Tr. p. 137) that he had lived with appellant 6 or 7 years and in response to the question "How old is he?" (appellant) the answer was "He is 18", although he didn't remember the date or year of appellant's birth.

This Court in *Sue v. Nagle*, 295 F. 676 (1924) has said:

"In cases of this character (Sec. 1993 derivative citizenship) experience has demonstrated that the testimony of the parties in interest as to the mere fact of relationship cannot be safely accepted or relied upon." (Words in parenthesis ours.)

And in *Lee Choy v. U. S.*, 49 F.2d 24, 27 (9th Cir. 1931):

"It is also contended that the testimony or declarations of said Lau Tin Ko and Lau Tin Hoo, who claim to be and were admitted as sons of said Lau Moon and Ching Shee, and who were shown to be somewhere on the mainland of the United States, come under the exceptions to the hearsay rule also. The answer to the latter contention is that these witnesses at the time of giving their testimony were shown to have been vitally interested in proving that they themselves, and not the appellant, were sons of Lau Moon and Ching Shee, and hence are shown not to be qualified to make their declarations admissible under the necessity principle.

‘The declarant must be disinterested; that is, disinterested in the sense that the declaration was not made in favor of his interest.’ *Sugden v. St. Leonards*, L.R. 1 P.D. 154; cited in *Wigmore on Evidence*, volume III, § 1420.

‘In order to adhere as closely as possible to the policy of shutting out all vague, second-hand, and unauthenticated evidence, such exception is made in favor of proofs of declarations and reputation (of family history) only where the persons whose opinion and declarations are relied upon, besides being those most likely to be well informed as to the facts, were also, so far as appears, free from all possible inducement to misrepresent the truth themselves or from any danger of being misled by others so interested. * * * It is then received * * * because ordinarily, they could have no temptation to falsehood or misrepresentation on such subject.’ *People v. Fire Ins. Co.*, 25 Wend. (N. Y.) 220; cited in *Wigmore*, *supra*, § 1482.

‘In cases of pedigree, (hearsay) is admitted, upon the ground of necessity, or the great difficulty, and sometimes, the impossibility, of proving remote facts of this sort by living witnesses, * * * there being no *lis mota* or other interest to affected the credit of their statement.’ *Ellicott v. Pearl*, 10 Pet. 434, 9 L. Ed. 475, Story, J.; *Wigmore*, *supra*, § 1481.”

See also:

Lau Hu Yuen v. U. S., 85 F.2d 327 (C.A. 9-1936).

The Court may find of interest certain observations made by counsel for appellant which are found at pages 178 and 179 of the transcript. At page 178, Mr. Hertogs stated:

“* * * And what has caused some of this in the past is the fact that it is very bad for a Chinese not to have a son. Ordinarily that is where we are confronted with a number of problems in these cases. Chinese custom requires them to have a son. If they don't have a son, they get a son.”

“The Court. Some how.”

“Mr. Hertogs. They get a son one way or the other, and he is put in the family and he takes his position in the family as if he were a legitimate son, because that is one of the most important things in their way of life.”

CONCLUSION.

Appellee has hereinabove set forth the proposition which appellants seek to sustain in this case and which counsel seek to make applicable to all derivative 903 cases. *The assertion under oath in the District Court by the claimant and the alleged parent that they are parent and child establishes a preponderance of the evidence sufficient to sustain the burden of proof and the defense must move forward to disprove the claim.*

The evidence herein amounts to nothing more than such an assertion by the claimant and the alleged father.

At page 22 of his brief appellant states:

“The evidence produced by the appellant was sufficient to establish the existence of the relationship under ‘reasonable judicial standards’. (*Chin Hong Yuk v. U. S.* (C.A. 9) 23 F.2d 174.) American citizenship is a most precious right. Its denial should not be allowed to rest upon a doubtful premise. *Machado v. McGrath*, 193 F.2d 706, Cert. den. 72 S. Ct. 557.”

The two cases cited in the above statement are not in point. Chin Hong Yuk was a Chinese who claimed *to be a native born citizen* of the United States. *He had been admitted to the United States by Immigration in 1922. Fifteen years later he was arrested by Immigration and held for deportation.* This Court found no reason to reject the testimony given by him in 1922 and held that while Section 3 of the Act of May 5, 1892, 8 U.S.C. 284, required that citizenship of a Chinese person must be proved to the satisfaction of the judge or commissioner, such proof “means nothing more than that the proof must be sufficient to satisfy reasonable judicial requirements.”

The *Machado* case involved an alien who had applied for relief from deportation in the form of an application for suspension of deportation. His application had been denied on the ground that having applied for exemption from military service, he was not eligible to become a citizen—a requisite to suspension. Machado was able to prove he did not know what he was doing when he applied for relief from military service and

that he had later volunteered to enter the United States Army. It was in this context that the Court said

“* * * that American citizenship, being a most precious right, its denial should not be allowed to rest upon a doubtful premise.”

To this appellee adds Judge Goodman's comment in *Ly Shew*—“We do not pass it out on a platter.”

Reference is again made to the briefs in *Fong Wone Jing* and *Ly Shew*. They are incorporated and made a part hereof in their entirety. Any further attempt to distinguish, explain, criticize, comment upon or otherwise consider any of the cases cited by appellants or appellees is repetitive to say the least.

Dated, San Francisco, California,
January 4, 1954.

Respectfully submitted,

LLOYD H. BURKE,
United States Attorney,

CHARLES ELMER COLLETT,
Assistant United States Attorney,

Attorneys for Appellee.

MORTON M. LEVINE,

United States Immigration and Naturalization Service,

On the Brief.

(Appendix A Follows.)



Appendix A



Appendix A

Filed Oct. 5, 1953

District Court of the United States
Southern District of California
Central Division

Wong Wing Sloo,

Plaintiff,

vs.

John Foster Dulles,
as Secretary of State,

Defendant.

No. 14,742-HW

Wong Fay Poo, by and through his
next friend, Hong Sick Koon,
Plaintiff,

vs.

John Foster Dulles,
as Secretary of State,

Defendant.

No. 14,761-HW

Wong Doon Loy,

Plaintiff,

vs.

John Foster Dulles,
as Secretary of State,

Defendant.

No. 14,864-HW

Chin Kwong Hing,

Plaintiff,

vs.

John Foster Dulles,
as Secretary of State,

Defendant.

No. 14,980-HW

MEMORANDUM

Plaintiffs in each of the above-entitled actions filed petitions for declaratory judgment under Section 503 of the Nationality Act of 1940. Subsequent to their filing, the government made motions to dismiss the actions on the grounds of (1) lack of jurisdiction of the subject matter of the defendant and (2) failure to state a claim upon which relief can be granted.

As authority for dismissal, the government cited *Lee Hung v. Acheson*, *Lee Siu v. Acheson* and *Lee Jam v. Acheson*, 103 F. Supp. 35, in which a similar motion had been made in the United States District Court of Nevada. The Court said, at page 38:

“As a jurisdictional prerequisite, it must appear from a complaint under 8 U.S.C.A. #903 that a plaintiff who claimed a right or privilege as a national of the United States was denied such right or privilege by any Department or agency, or executive official thereof, upon the ground that he is not a national of the United States.

“ . . .

“Each of the complaints of the said plaintiffs should be dismissed for the reason that in none of said complaints is there a compliance with Rule 8(a) (1), Federal Rules of Civil Procedure, there being no allegation in any of said complaints that the plaintiff therein claimed and was denied a right or privilege as a national of the United States upon the ground that he is not a national of the United States.”

Feeling that the rights of the plaintiffs in the cases at bar should not be disposed of on a technical motion,

the Court, on June 22, 1953, set down all four cases for pre-trial hearing upon the sole issue of jurisdiction of this Court to hear the petitions and instructed counsel to present at the pre-trial hearing any evidence they might have relative to the jurisdictional question.

At the pre-trial hearing on September 21, 1953, plaintiffs appeared by counsel and represented that they did not have any testimony to offer on the question of jurisdiction but insisted the allegations of the complaints themselves were sufficient to clothe this Court with jurisdiction. When plaintiffs' counsel announced they had no evidence in behalf of plaintiffs, or any or either of them, the Court then asked the United States attorney for evidence relative to denial of the passports or certificates of identity.

The United States Attorney presented to the Court the certified passport file in each of the instant cases. The government requested that the files be marked for identification, which was done, and subsequently requested their admission into evidence. Plaintiffs objected to admission of the files in evidence, and the question of whether they should be admitted was taken under submission by the Court.

Plaintiffs find themselves in a dilemma. They had no evidence to present at the pre-trial hearing. They objected to the only available evidence—the passport files. It seems that since plaintiffs themselves have not established the Court's jurisdiction, the four cases could be summarily dismissed. This is a Court of limited jurisdiction, and to maintain an action herein

it is necessary that plaintiffs first establish that the Court has jurisdiction to hear it. Deeming it necessary to have all available information concerning plaintiffs' rights to be heard, the Court has decided to admit the official passport records into evidence, not for the purpose of considering any testimony or reviewing the effect thereof but only for the limited purpose of ascertaining whether plaintiffs, or any or either of them, have been denied any right or privilege as nationals of the United States on the ground that they were not such nationals.

In an earlier case *Fong Nai Sun*, by *Fong Kwok Wah*, his next friend, vs. *John Foster Dulles*, as Secretary of State, #13,417, in which this Court filed a Memorandum, we said:

“There is, however, a more important matter presented to the court. It relates to the question of jurisdiction. Section 908, Title 8, U.S.C.A., provides:

“ ‘If any person who claims a right or privilege as a national of the United States is denied such right or privilege by any Department or agency, or executive official thereof, upon the ground that he is not a national of the United States, such person, regardless of whether he is within the United States or abroad, may institute an action against the head of such Department or agency in the District Court of the United States for the District of Columbia or in the district court of the United States for the district in which such person claims a permanent residence for a judgment declaring him to be a national of the United States.’ For this Court to have jurisdiction under

the above statute it must appear that plaintiff herein has been denied a right or privilege enjoyed by a national of the United States.

“ ‘It is settled that, when a person attempts to enter this country through the official immigration channels, and claims the right to enter on the ground that he is an American citizen, he is not entitled to have his claim determined in a judicial proceeding. . .

United States v. Brough, 16 F2d 492. (Affirmed: 20 F.2d 1023; Certiorari denied, 275 U.S. 599).’

“However, Congress has determined that if the applicant has been denied a right or privilege on the ground he was not a national of the United States, the Federal Court would have jurisdiction to hear and determine the matter. But if the Federal Court is to have jurisdiction, it must appear the rights or privileges denied were refused upon the sole ground that the applicant was not a national of the United States.

“ . . .

“Citizens do not have an absolute right to demand and receive a passport. One may be a citizen of this country and yet, for various reasons, may be denied the right to travel. . . .”

To dispose of the rights of the plaintiffs herein and to determine whether denial of a right of passport was upon the ground that applicant was not a national of the United States, the Court deems it important to look at the official passport files.

WONG DOON LOY

It appears that on August 11, 1952, the American Consul at Hong Kong addressed a letter to Jackson & Hertogs, 580 Washington Street, San Francisco 11 California, who are attorneys representing plaintiff in the case at bar, in which it is stated that the evidence in support of the Wong Doon Loy application for passport consists solely of four affidavits made by non-members of the Wong family. The letter pointed out that the requirements of family members as witnesses could not properly be waived. The passport file indicates this letter was never answered. On April 7, 1953, a similar letter was addressed to the alleged father of Wong Doon Loy, and a request was made for a blood report of the father. The file indicates that none of these letters were answered.

It appears from the record that the Consulate General has not completed processing this application, and the State Department has not made a final determination of applicant's claim to citizenship. It is evident that this plaintiff has not exhausted his administrative remedies.

As pointed out in the *Fong Nai Sun* case, *supra*, citizens do not have an absolute right to demand and receive passports. One may be a citizen of this country and yet for various reasons may be denied the right to travel, for he may be unable to satisfy the family-background-information requirement of the passport application. Also, under the form presented, the applicant must produce someone who can testify

that he is a citizen of the United States. Plaintiff Wong Doon Loy in the case at bar has failed to establish his right to passport privileges under these particular requirements.

The question presented to the Court in this case is whether, prior to adjudication by the Department of State that plaintiff is not a citizen of the United States, he may appeal to the Federal Court for determination of this question. The only right of appeal to the Federal Court is upon the ground that he had been denied a right or privilege as a national of the United States upon the ground that he is not such national. There is no evidence in the record to indicate plaintiff has been denied any such right or privilege. The record shows he is being treated in exactly the same manner as each and every applicant for passport is treated. There is nothing before the Court to indicate in any way that this Court has any jurisdiction of his alleged cause of action.

CHIN KWONG HING

In the *Chin Kwong Hing* case the official passport record indicates Chin Kwong Soon and Chin Kwong Hing appeared at the office of the American Consulate General in Hong Kong, claiming to be the first and second sons of an American citizen father, Chin Quocey (Fee). Applicants were blood-typed at Hong Kong, China, and the alleged parents were blood-typed through Immigration and Naturalization Service in Los Angeles, California, with the following results:

	<i>Name</i>	<i>Group</i>	<i>M-N</i>
Father:	Chin Quocey (Fee)	A	M
Mother:	Mah Suey Jin	O	MN
Son:	Chin Kwong Soon	B	MN
Son:	Chin Kwong Hing	A	MN

The results of the blood-type tests proved conclusively that Chin Kwong Soon cannot be the offspring of the two persons whom he and Chin Kwong Hing allege to be their parents.

The official passport file indicates that on November 4, 1952, these applicants were informed that at least one of them must be an imposter, and the applications were denied. In this case the denial of a passport is not upon the ground that applicants were not nationals of the United States. Denial is solely and only upon the ground that the claim of parentage is fraudulent. Hence the Court must conclude it does not have jurisdiction.

WONG FAY POO

The American Consulate General in Hong Kong requested that the paternal grandfather and grandmother of Wong Fay Poo be produced as witnesses for plaintiff. Applicant's father represented to the Counsel's office that inasmuch as the grandparents were over seventy years of age and lived in a village some distance from Hong Kong it would not be feasible for them to appear as witnesses for applicant. The father of applicant (Wong Sick Koon) also refused, on behalf of himself and his wife, to be blood-typed with their alleged son to establish a possible relationship.

A review of the passport file indicates the application of Wong Fay Poo was disapproved on the ground of insufficient evidence to establish the identity and relationship alleged. Again we have denial of a passport, not upon the ground that applicant was not deemed to be a national of the United States, but upon the ground that he had failed to establish or verify the facts in his application for passport.

So, again, the Court is forced to the conclusion that this is not denial upon ground applicant is not a national of the United States.

WONG WING SLOO

Wong Wing Sloo was denied a passport because of his inability to produce documents or evidence satisfactorily establishing his claim of identity and relationship to the persons claimed as his relatives and because of discrepancies in the testimony given by him at the time of application and by his alleged mother and brother. The file indicates he was denied passport facilities because of failure to establish the identity alleged.

Testimony in cases such as these is always unsatisfactory because of discrepancies in statements made by the various witnesses. If the Court was reviewing testimony in an attempt to determine whether the discrepancies were of sufficient moment to justify a conclusion that plaintiff was not the son of a citizen, it would be confronted with an entirely different problem from that presented in the proceedings at bar. Here the only question presented is jurisdiction. If

this Court has jurisdiction, it must be upon the sole ground that plaintiffs have been denied a right or privilege as nationals of the United States upon the ground that individually they are not such nationals. A refusal to grant a passport upon the ground of unsatisfactory or contradictory evidence, or failure of an applicant to establish his identity is not a denial of his claim of citizenship. Every citizen, whether here or abroad, when making application for a passport must establish to the satisfaction of the State Department, in accordance with the forms provided and approved for that purpose, that he is entitled to the passport, and until he fulfills the prescribed requirements he may not have the passport privilege.

The Court in this instance must hold, as in the foregoing three, that denial of a passport was not upon the ground that Wong Wing Sloo is not a citizen of the United States.

Inasmuch as plaintiffs have been unable to establish that this Court has jurisdiction, and as the official files of the State Department indicate the denials were not such as to give this Court jurisdiction, it is necessary to grant the defendant's motion to dismiss the petitions.

Motion for dismissal granted.

Dated: October 1, 1953.

HARRY C. WESTOVER,
District Judge.

No. 13,746

IN THE

United States Court of Appeals
For the Ninth Circuit

CHOW SING, by his Guardian ad Litem,
Chow Yit Quong,

Appellant,

VS.

HERBERT BROWNELL, JR., Attorney Gen-
eral of the United States,

Appellee.

APPELLANT'S REPLY BRIEF.

JACKSON & HERTOGS,

JOSEPH S. HERTOGS,

580 Washington Street, San Francisco 11, California.

Attorneys for Appellant.

FILED

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Chow Yit Quong,

Appellant,

vs.

HERBERT BROWNELL, JR., Attorney Gen-
eral of the United States,

Appellee.

APPELLANT'S REPLY BRIEF.

The greater part of appellee's brief is devoted to contending that the trial Court did not have jurisdiction of the case, a contention, incidentally, which the appellee did not make in the Court below.

The appellee at page 8 in his brief states:

"Does the Court have jurisdiction of the appellant's claim under 8 U.S.C. 903?

A. Appellant had not resided in the United States prior to making his claim;

B. There was no denial of a "right or privilege" within the meaning of Section 903;

C. The only judicial remedy available to appellant is habeas corpus."

In his argument relative to jurisdiction, appellee discusses many matters which do not actually involve the jurisdiction of the Court, however, for the purpose of clarity we will discuss the above questions before proceeding to the main issue—the United States nationality of the appellant herein.

JURISDICTION.

To present a case within the jurisdiction of the federal Court, a plaintiff must state a cause of action of which the statutes give federal Courts jurisdiction, and whether the federal Courts may assume jurisdiction is determinable by the allegations of the complaint. As a general rule if the allegations of the bill in good faith make a claim within the jurisdiction of the Court, the Court has jurisdiction whether or not the claim is well founded.

Utah Fuel Co. v. National Bituminous Coal Commissioner, 59 S.Ct. 409, 306 U.S. 56.

APPELLEE'S SUBPARAGRAPH A.

It is asserted that “appellant had no residence in the United States upon which to found a claim of ‘permanent residence’ in that he had never previously been in the United States”.

The term “claims a permanent residence” as used in the statutory language of Section 903, Title 8, relates to venue and not jurisdiction of the trial Court.

Also in support of his contention appellee relies upon and incorporates other briefs filed in this Court. In reply thereto appellant incorporates herein and makes a part hereof pages 14 to 21 of appellant's reply brief in *Fong Wone Jing, et al. v. Dulles*, No. 13745.

At pages 8 to 18 of appellee's brief in *Fong Wone Jing*, appellee contends for the proposition that the District Court is precluded from jurisdiction by the purposes and intent of Section 903, Title 8. Appellee thereupon concludes that the legislative purpose and intent was to restrict the benefits of that section to those who had theretofore resided in the United States and lost their United States citizenship by expatriation. Even cursory examination of the words of the statute reveals appellee's attempt to so stringently restrict the section's benefits to be error based upon a conclusion that cannot be drawn by application of any reasonable or logical method of statutory construction. Where the language of the statute is plain and unambiguous, there is no occasion for construction even though other meaning may be found; and the Court cannot indulge in speculation as to the probable or possible qualifications which might have been in the minds of the legislators, but the statute must be given effect according to its plain and obvious meaning.

U. S. v. Missouri Pacific Ry Co., 49 S.Ct. 133,
278 U.S. 269;

Commissioner of Immigration v. Gottlieb, 265
U.S. 310, 44 S. Ct. 258.

In the instant case the first three words of the particular section in question are: "If any person * * *." These words have a clear and concise meaning. The present appellant is a person for whom this judicial relief was enacted.

Appellee quotes at considerable length from Congressional debates upon the bill which became the Nationality Act of 1940. Nowhere in this discussion is there any indication that the provisions of this proposed amendment should be restricted to persons who lost citizenship through the expatriation clauses of Part IV thereof. As a matter of fact, it clearly appears that these provisions were to provide a judicial remedy for those whose United States citizenship was challenged by an administrative body. The statement of Mr. Rees, Congressional Record, Vol. 86, Part 12, page 13247:

"For instance, take a man who is born abroad of American citizen parents. That person born abroad, born in Italy or Germany or France or whatever it may be, if his parents are American citizens he is an American citizen because he is the child of American citizens."

completely contradicts and defeats appellee's contention that the benefits of Section 903 are available only to those who lost citizenship by expatriation.

The same view was expressly approved by the Courts in:

Ow Yeong Yung v. Dulles, 116 F. Supp. 766,
768;

Look Yun Lin v. Acheson, 87 F. Supp. 463, 465;
Mah Ying Og v. Clark, 81 F. Supp. 696.

To conclude the discussion as to this phase of the argument, the Courts have uniformly rejected the proposition now urged by appellee. Moreover, the language of the section itself precludes such an interpretation. The effort to support the proposition by resort to the Congressional debate is likewise ineffectual.

APPELLEE'S SUBPARAGRAPH B.

It is asserted here that the District Court was without jurisdiction because the appellant was not denied a right or privilege within the meaning of Section 903.

Appellee has incorporated other briefs by reference. In reply thereto appellant incorporates and makes a part hereof pages 2 to 14 of appellant's reply brief in *Fong Wone Jing*.

Appellee blandly asserts that the exclusion of appellant by the Immigration Service "is not a denial of right or privilege of a national on the ground that he is not a national, but a determination that the individual is an alien."

It is not necessary for us to devote considerable attention to the niceties of construction of the term "rights or privileges as a national." It is not necessary to even define or delineate such rights or privileges. There are certain inherent and fundamental rights guaranteed to a United States citizen or na-

tional by the constitution of the United States. One such fundamental and inherent right of a United States citizen or national is a right to partake of the privileges granted to other members of the same class. It is a deprivation of "life" and "liberty" to deny a United States citizen or national the right to reside within the confines of this nation. Banishment and exile is contrary to the precepts of the Constitution of the United States. A restraint on the right of a United States citizen or national to enter this country is a violation of personal liberty and a denial of a right or privilege.

As we further understand the appellee's point, it is this: Granting that plaintiff is a national and has been denied a right or privilege as a national, there still remains the fatal deficiency that it is not alleged or proven that the denial by the appellee was based on the ground that the "appellant was not a national". Does the appellee come before this Court and say that no Court may entertain a suit of this nature unless I decide to reject a United States claimant in the statutory language? If we were to accept the appellee's contention it would be possible for this appellee or any other administrative agency of the government to deny all United States national claimants the right to a day in Court in accordance with the provisions of Section 903. The act would become a nullity. The rights and privileges of United States nationals would then be governed by a play on words.

It is not necessary that the allegation asserting a denial of a right or privilege be in the statutory lan-

guage. The Court can look to the substance and not to the form. What was the practical effect, in this case, when the Immigration Service made a determination that the appellant was an alien?

The Nationality Act of 1940 provided:

For the purposes of this chapter:

(a) The term "national" means a person owing permanent allegiance to a state.

(b) The term "National of the United States" means (1) a citizen of the United States, or (2) a person who, though not a citizen of the United States, owes permanent allegiance to the United States. *It does not include an alien.* (8 U.S.C.A. 501.) (Italics ours.)

The immigration laws of the United States in effect at the time of this appellant's application for admission to the United States as a citizen thereof provided:

"The word 'alien' wherever used in this chapter shall include any person not a native-born or naturalized citizen of the United States;" (8 U.S.C.A. 173).

It was stated by the Court of Appeals for the Second Circuit in *Scholz v. Shaughnessy*, 180 F. 2d 450, that:

"For the purposes of the Nationality Act a 'national of the United States' is either a 'citizen' or 'a person who, though not a citizen * * * owes permanent allegiance to the United States.' The word 'does not include an alien'. The word 'alien' in the Immigration Act meant 'not a native-born or naturalized citizen'; and presumably that is

its meaning in the Nationality Act. In any event the relator is an alien and an alien is not a 'national of the United States'."

The record establishes that the appellant applied for admission to the United States as a citizen thereof; that the appellee found the appellant to be an alien; and that the appellee ordered the appellant deported as an alien. The net result is that the appellee refused to recognize or admit the United States nationality of the appellant. The cases cited by appellee at page 10 in his brief are all on appeal awaiting determination of this Court. Compare the more recent decision of Judge Roche in *Ow Yeong Yung v. Dulles*, supra.

From the foregoing it must be concluded that a right of action accrued to this appellant when the Immigration Service refused to recognize the appellant's claim to United States nationality. The order of deportation of appellant as an alien was a denial of a right or privilege upon the ground that appellant was not a national of the United States.

APPELLEE'S SUBPARAGRAPH C.

Appellee urges that appellant's sole remedy is by way of habeas corpus. In support thereof he cites numerous cases which were decided prior to the Nationality Act of 1940. In the case at bar the proceeding is a suit brought under an Act of Congress which expressly authorizes such an action. This statute was

not in being when any of the cases cited by appellee were determined.

The Court of Appeals for the District of Columbia and the Second Circuit have both held that an appellant who was born in China of an alleged American citizen parent was entitled to have his citizenship judicially determined under Section 903.

Mah Ying Og v. McGrath, 187 F. 2d 199, 201 ;

Chu Leung v. Shaughnessy, 176 F. 2d 249, 250.

The case of *Heikkila v. Barber*, 345 U.S. 229, cited by appellee at page 12 is not in point. As stated by appellee the case "involved the question of the judicial remedy available to an *alien* whom immigration sought to deport." We are here confronted with the right of a citizen and not an alien. The appellant is entitled to the judicial relief afforded by congressional enactment. This view is supported by a long line of judicial precedents.

THE FINDINGS OF FACT AND CONCLUSIONS OF LAW AND JUDGMENT ARE ERRONEOUS.

In reply to appellee's brief the appellant incorporates and makes a part hereof pages 23 to 32 of appellant's reply brief in the case of Fong Wone Jing. The appellee admits that the contention of appellant, as to the quantum of evidence required to establish the citizenship rights of people similarly situated, has been consistently followed by the Immigration Service for an untold number of years. (p. 17.) It is well

recognized that such an administrative practice is not binding upon this Court, but it is offered to establish the harmony of appellant's proposition and prior administrative practices.

Reference is made to the cases cited at page 26 of appellee's brief. Those cases were determined under the applicable provisions of the Chinese Exclusion Act. That Act specifically provided that a person of the Mongolian race was presumed to be an alien. However, the Act was repealed in its entirety on December 17, 1943, 57 Stat. 600.

Without being repetitious we once again assert that the cases cited in our opening brief clearly establish that the findings of fact, conclusions of law, and judgment of the lower Court are erroneous. Appellee has not cited any cases which overrule these judicial precedents. He seeks to avoid the effect of the doctrine expressed in those opinions by asserting that in those cases the Court was in error.

Remarks of appellee at pages 17, 23 and 31 veer sharply to accusation rather than legal reasoning. These statements might have value as a basis for moves to impeach members of the Court or investigate past actions of the Immigration Service, but they fail to contribute toward solution of the issues here and we would suggest that they be disregarded.

THE EVIDENCE.

The lower Court concluded that the "evidence presented by plaintiff does not conform to the standards fixed in *Ly Shew v. Acheson*, #30159 and #31161, this day decided." (T. 21.) (110 F. Supp. 50.)

In arriving at the standards to be applied to a case of this nature, including the instant matter, the lower court considered extraneous and immaterial matter which had no relevant bearing on the issue before the Court. We cite only a few:

1. The fact that the witnesses cannot speak a word of English (page 52).
2. The mutuality of facts as set forth in the case of *Mar Gong v. McGranery*, 109 F. Supp. 821 (page 55).
3. The volume of cases pending before the Court and the time it would take to clear the calendar (page 56).
4. Consideration of statistical data furnished by the defendant concerning other cases pending before that administrative agency (page 56).
5. Considering criminal prosecutions throughout the district during the years 1947 to 1950, inclusive (page 56).

It is submitted that the principles enunciated by the lower Court in the *Ly Shew* case are erroneous. Compare the decision of this Court in *Mar Gong v. Brownell*, No. 13,787, decided January 12, 1954; the

decisions of Judge Roche in *Ow Yeong Yung v. Dulles*, 116 F. Supp. 766, and *Lee Mon Hong v. McGranery*, 110 F. Supp. 682; and the decision of Judge Ford, United States District Court, Massachusetts, in the case of *Soo Hoo Yin Deep v. Dulles*, 116 F. Supp. 25.

At the conclusion of the trial in the case at bar the Court indicated that it believed the appellant was the lawful son of Chow Yit Quong, a recognized United States citizen. (T. 177.) However, it was concluded that the evidence presented did not meet the new special quantum of proof required by the *Ly Shew* decision.

In *Kwock Jan Fat v. White*, 253 U.S. 454, 464, 40 S. Ct. 566, 64 L. Ed. 1010, the Supreme Court stated:

“It is better that many Chinese immigrants should be improperly admitted than that one natural born citizen of the United States should be permanently excluded from this country.”

We submit that if the Court believes the appellant is the lawful blood son of a recognized United States citizen, there is no further issue for determination. Once that relationship is conceded the appellant must be recognized as a United States citizen pursuant to the statutes which were in effect at the time of his birth.

CONCLUSION.

We submit that the appellee's challenge to the jurisdiction of the trial Court in the case at bar is without merit. Appellee's objection to appellant's claim to permanent residence goes to the issue of venue and not jurisdiction of the Court. The statute, Section 903, permits the filing of such action in the District Court for the District of Columbia or in the district where the complainant "claims" a permanent residence. The complaint in the case at bar meets this requirement (T. 5.)

The appellee made a determination that the appellant is an alien. An alien is one who is not a citizen or national. The refusal of the appellee to admit the appellant into the United States as a citizen thereof was a denial of a right or privilege within the meaning of Section 903.

The burden of proof imposed upon the appellant by the trial Court (as indicated in its opinion in the case of *Ly Shew*) clearly manifests a miscarriage of justice. The issue should have been determined by reasonable judicial standards.

When the relationship was established, as indicated by the trial Court, the ultimate issue of this judicial proceeding was determined. A son of a recognized United States citizen is a United States citizen. The citizenship of this appellant was clearly established by the evidence and the findings of the trial Court to the contrary are erroneous.

Wherefore, it is respectfully submitted that the judgment of the lower Court be reversed.

Dated, San Francisco, California,

February 19, 1954.

Respectfully submitted,

JACKSON & HERTOGS,

By JOSEPH S. HERTOGS,

Attorneys for Appellant.

No. 13,746

IN THE

United States Court of Appeals

For the Ninth Circuit

CHOW SING, by his Guardian ad Litem,
Chow Yit Quong,

Appellant,

VS.

HERBERT BROWNELL, JR., Attorney Gen-
eral of the United States,

Appellee.

Upon Appeal from the United States District Court
for the Northern District of California,
Southern Division.

APPELLANT'S PETITION FOR A REHEARING.

JOSEPH S. HERTOGS,

580 Washington Street, San Francisco 11, California,

*Attorney for Appellant
and Petitioner.*

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DEC 22 1954

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vs.

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eral of the United States,

Appellee.

**Upon Appeal from the United States District Court
for the Northern District of California,
Southern Division.**

APPELLANT'S PETITION FOR A REHEARING.

*To the Honorable William Denman, Chief Judge, and
to the Honorable Clifton Mathews and Honor-
able Homer T. Bone, Associate Judges of the
United States Court of Appeals for the Ninth
Circuit:*

Appellant in the above-entitled cause, presents this, his petition for a rehearing of the above-entitled cause, and in support thereof respectfully shows:

The District Court in its order for judgment dated January 12, 1953 concluded that the "evidence pre-

sented by plaintiff does not conform to the standards fixed in *Ly Shew v. Acheson*," 110 F. Supp. 50 (T. 21). Pursuant to such order the Court on February 17, 1953, approved a finding lodged by appellee that "The person who claims to be plaintiff Chow Sing has failed to introduce evidence of sufficient clarity to satisfy or convince this Court that Chow Yit Quong is the natural blood father of the person known as Chow Sing, or that the person who appeared before the Court claiming to be plaintiff Chow Sing is in truth and in fact Chow Sing."

This Court in its decision dated November 24, 1954, found:

"Thus in effect, the District Court found that Sing had not sustained his burden of proof.

The finding was not clearly erroneous. We therefore accept it as correct * * *."

The finding of the District Court that the appellant had not sustained the burden of proof was predicated upon the standards announced by the Court in *Ly Shew v. Acheson*, supra. Those standards have since been rejected by this Court. See *Mar Gong v. Brownell*, 209 F. 2d 448; *Ly Shew v. Dulles*, decided August 18, 1954. The Seventh Circuit in a recent, well-considered opinion likewise rejected the "clear and convincing proof" theory. *Lee Wing Hong v. Dulles*, 214 F. 2d 753.

The District Court applied this erroneous standard in determining that the appellant had not introduced evidence of sufficient clarity to establish the validity

of his claim. The burden of proof imposed by that Court was over and beyond that prescribed by law. Equity and justice require this Court to consider the findings in the light of the Court's opinion.

Under similar facts, this Court in *Mar Gong v. Brownell*, supra, reversed and remanded with directions to make findings in the light of that opinion. Also compare *Takehara v. Dulles*, 205 F. 2d 560. Appellant by this petition seeks the same relief.

Appellant respectfully requests that this petition for a rehearing be granted and that on such rehearing the decision of this Court and the District Court be reversed and that the case be remanded to the lower Court for further consideration.

Dated, San Francisco, California,
December 22, 1954.

Respectfully submitted,
JOSEPH S. HERTOGS,
*Attorney for Appellant
and Petitioner.*

CERTIFICATE OF COUNSEL

I hereby certify that I am counsel for appellant and petitioner in the above-entitled cause and that in my judgment the foregoing petition for a rehearing is well founded in point of law as well as in fact and that said petition for a rehearing is not interposed for delay.

Dated, San Francisco, California,
December 22, 1954.

JOSEPH S. HERTOGS,
*Attorney for Appellant
and Petitioner.*

No. 13,746

IN THE

United States Court of Appeals
For the Ninth Circuit

CHOW SING, by his guardian ad litem,
Chow Yit Quong,

Appellant,

vs.

HERBERT BROWNELL, JR., Attorney General
of the United States,

Appellee.

BRIEF FOR APPELLANT.

JACKSON & HERTOGS,

By JOSEPH S. HERTOGS,

580 Washington Street, San Francisco 11, California,

Attorneys for Appellant.

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No. 13,746

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eral of the United States,

Appellee.

BRIEF FOR APPELLANT.

JURISDICTIONAL STATEMENT.

The plaintiff-appellant filed in the United States District Court for the Northern District of California, Southern Division, a petition seeking a declaratory judgment of United States citizenship. Such action was filed in accordance with the provisions of former Section 503 of the Nationality Act of 1940 (8 U.S.C. 903). Actions filed prior to December 24, 1952 were preserved by the savings clause of the Immigration and Nationality Act of 1952 (Sec. 405(a); 8 U.S.C.A. 1101, note).

The District Court denied plaintiff's petition for a declaratory judgment (T. 24) and the plaintiff ap-

pealed to this Court (T. 25). This Court reversed and remanded the cause to the District Court for further consideration in conformity with the opinion of this Court (T. 189).¹ Upon reconsideration the District Court once again denied plaintiff the relief requested (T. 191-193). The plaintiff, under date of June 1, 1955, filed his appeal from the judgment of the District Court dated April 6, 1955 (T. 194).

Jurisdiction of this Court to review the District Court's decision is conferred by 28 U.S.C.A. 1291 and 1292.

STATUTES INVOLVED.

Section 1993 of the Revised Statutes of the United States, as amended by Section 1 of the Act of May 24, 1934 (48 Stat. 797) reads:

“Any child hereafter born out of the limits and jurisdiction of the United States, whose father or mother or both at the time of the birth of such child is a citizen of the United States, is declared to be a citizen of the United States; but the right of citizenship shall not descend to any such child unless the citizen father or mother, as the case may be, has resided in the United States previous to the birth of such child. In cases where one of the parents is an alien, the right of citizenship shall not descend unless the child comes to the United States and resides therein for at least five years continuously immediately previous to his eighteenth birthday, and unless, within six months

¹217 F2d 140, citing *Mar Gong v. Brownell*, 9 Cir., 209 F2d 448; *Lee Wing Hong v. Dulles*, 7 Cir., 214 F2d 753.

after the child's twenty-first birthday, he or she shall take an oath of allegiance to the United States of America as prescribed by the Bureau of Naturalization.'"²

Section 503 of the Nationality Act of 1940 (8 U.S.C.A. 903) provides, in so far as pertinent here:

"If any person who claims a right or privilege as a national of the United States is denied such right or privilege by any Department or agency, or executive official thereof, upon the ground that he is not a national of the United States, such person, regardless of whether he is within the United States or abroad, may institute an action against the head of such Department or agency in the District Court of the United States for the District of Columbia or in the district court of the United States for the district in which such person claims a permanent residence for a judgment declaring him to be a National of the United States. * * *"³

²The requirement that such children must reside in the United States for at least five years immediately previous to attaining the age of 18 years was retrospectively changed by the 1940 Act to provide that such residence must be between the ages of thirteen and twenty-one years (8 U.S.C. 601(g)(h)), and was again retrospectively changed by the 1952 Act to require that the child must come to the United States before attaining the age of twenty-three years and must be continuously physically present in the United States for five years between the ages of fourteen and twenty-eight years (8 U.S.C. 1401(b)(c)).

³This statute has been repealed by the Immigration and Nationality Act of 1952 (8 U.S.C. sec. 1101, et seq.) which became effective December 24, 1952, but Section 405(a) of the latter Act continues the former statute in force and effect as to suits which were pending before the new Act became effective (66 Stat. 280).

STATEMENT OF THE CASE.

The appellant claims to be the lawful blood son of Chow Yit Quong. The defendant-appellee admits that the said Chow Yit Quong is and was at the time of the birth of the appellant a United States citizen.

The appellant arrived at the port of San Francisco, State of California, ex the SS "President Wilson" on August 23, 1950, seeking admission to the United States as a citizen thereof. A Board of Special Inquiry denied appellant's application for admission and recognition as a United States citizen. The appellate administrative authorities affirmed the Board's decision and excluded the appellant from the United States. Thereafter, this action was brought in the Court below under the provisions of Section 503 of the Nationality Act of 1940 (8 U.S.C.A. 903) for the purpose of establishing the United States nationality of the appellant herein.

This case came to trial without a jury. The appellant, his father, Chow Yit Quong, his brother, Chow Sam, and one disinterested witness, testified concerning the claimed relationship. Under date of January 12, 1953 the lower Court concluded that the "evidence presented by plaintiff does not conform to the standards fixed in *Ly Shew v. Acheson*, 110 F. Supp. 50, this day decided". On appeal, this Court reversed and remanded directing the District Court to make findings in the light of its decision, *Chow Sing v. Brownell*, 217 F.2d 140.

Pursuant to the mandate of this Court, on March 11, 1955, further proceedings were had in the trial

Court. The proceedings had therein are fully set forth in the instant record (T. 196-236). Following these proceedings the trial Court once again rendered judgment in favor of the defendant-appellee. It is from this last decision that the present appeal follows.

SPECIFICATION OF ERRORS.

1. That the findings of the District Court are clearly erroneous.
 2. That the District Court failed to comply with the mandate of this Court.
 3. That the findings, conclusions and judgment of the District Court are unsupported by the evidence of record.
 4. That the findings, conclusion and judgment of the District Court are contrary to the evidence of record.
 5. That the District Court erred in finding that the plaintiff-appellant did not have a claim to permanent residence within the Northern District of California or in the United States of America.
 6. That the District Court erred in concluding that the plaintiff-appellant, Chow Sing, is not a United States citizen.
-

ARGUMENT.

Specification of errors numbered 1, 3, 4, 5 and 6 are similar to those argued on the earlier appeal to

this Court (T. 185). For the sake of brevity reference is made to the briefs presented to this Court upon the occasion of the prior appeal. In connection with this issue, there is only one additional factor which appellant wishes to point out at this time. This issue will be discussed under the heading—"Judgment Contrary to Law and Contrary to the Evidence". Specification of Error No. 2 will be discussed as a separate topic under the heading "The Trial Court Failed to Obey the Mandate of this Court".

**JUDGMENT CONTRARY TO LAW AND CONTRARY
TO THE EVIDENCE.**

The law will not permit a judgment to be governed by mere sentiment, conjecture, sympathy, passion or prejudice. It demands, and a plaintiff has the right to expect, that all of the evidence will be carefully and dispassionately weighed and considered, and that the judgment will, regardless of the consequences, reflect the beliefs of the trier.

This Court has previously stated that in a case of this nature the plaintiff must establish his burden of proof by a preponderance of the evidence.⁴ This term "preponderance of the evidence" is not a mere figure of speech. It is proper to find that a party has succeeded in carrying this burden of proof on an issue of fact, if the evidence favoring his side of the question is more convincing than that tending to sup-

⁴*Mar Gong v. Brownell*, 209 F2d 448; *Brownell v. Lee Mon Hong*, 217 F2d 143; *Ly Shew v. Dulles*, 219 F2d 414.

port the contrary side, and if it causes the trier of the facts to believe on that issue, the probability of truth favors that party.

Upon conclusion of the trial, after submission of the evidence and closing arguments of counsel, which incidentally occurred while all of the foregoing were fresh in the mind of the trial Court, Judge Goodman stated:

“Now, Mr. Hertogs, my feeling in the matter is, and it is sort of an intuitive feeling—I’m inclined to think that maybe this boy is the son.” (T. 177.)

Viewing this remark realistically, there can be but one conclusion, i.e., plaintiff-appellant presented sufficient evidence to establish in the mind of the trial Judge that the claimed relationship actually existed. Applying the applicable principles of the preponderance of evidence rule plaintiff-appellant sustained his burden of proof, and judgment should have been granted accordingly.

**THE TRIAL COURT FAILED TO OBEY THE
MANDATE OF THIS COURT.**

The mandate of this Court (T. 189, 190) directed the trial Court to make findings in the light of the recent opinions of this Court. In those earlier opinions, this Court held that plaintiffs, in declaratory judgment suits such as the instant matter, were only required to prove their cases by the ordinary burden of proof (preponderance of the evidence) resting on plaintiffs in other civil actions.

Pursuant to the mandate, further proceedings were had in the trial Court on March 11, 1955. At that time, the instant matter and *Ly Shew v. Acheson*, supra, were consolidated for the purpose of argument. A complete transcript of those proceedings has been incorporated in the present record (T. 196-236).

It is very apparent, from a reading of that transcript, that the trial Judge still adhered to his original viewpoint enunciated in his earlier opinion, and contrary to the views expressed by this Court. In support of this contention, we cite part of that record, but sincerely request this Court to read the entire proceeding. Starting at page 208 that record shows the following:

“The Court. That is a problem, of course, I don’t think any appellate court fully realizes, the difficulty of relating these cases to the ordinary standard of cases. And because of the difficulty of the Court in evaluating the testimony, that brought about my statement of the rule which I thought should be applied to this type of case.”

* * * * *

“And since we have in a great number of similar cases of a similar kind found that there has been fraud and chicanery and lying and everything else involved in them, we approach them with caution. It is because of the general circumstances of this and similar cases. It makes it difficult to appraise the testimony.

It’s all done in a foreign language. And the difficulties involved in appraising the testimony given through interpreters, where rarely you have

anyone who is able to speak firsthand as to the facts and speak our language.”

* * * * *

At pages 209 and 210:

“So that is the reason why I came to that conclusion in this case. I just wasn’t convinced by the evidence in this case that, in the shape it was in, that the evidence satisfied me that these two youngsters were the children of Ly Shew.

It is true I imposed a different standard of proof. That is, I suggested, declared according to my view, a different standard of proof. But the problem still remains just the same.

If I were to make a finding now that Ly Shew was the father—I say that in all fairness to counsel for the Plaintiff—if I were to make a finding and I would be prepared to say so in a supplemental finding, if I were to make a finding now and find as a finding of fact that Ly Shew was the father of these two children, I would be making the (17) finding not of my own volition but under some command from another judge.

Now, if another judge who has the power to make a decision wants to make a decision to that effect, I have no quarrel with it, because another judge might decide it another way. But I don’t see how I could in justice and in good conscience make a finding of fact because some other judge tells me I should make a finding of fact. It has no reason to it at all. There is no reason behind that at all.

If another judge wants to direct that judgment be entered, that’s a different matter. It might be well within the power of the Court to do that.

I am merely speaking at random, gentlemen, pointing out that there is a problem of findings in the case, and that is why I thought I ought to have the view of counsel in the matter."

At page 212:

"The Court (interposing): I have just as much difficulty in proceeding upon the theory of making a finding that he is the father as I have that he is not the father. The same difficulty that existed before exists. And I haven't been helped any by the Appellate Court. I mean, it doesn't make much difference about the standard."

At pages 218 and 219:

"The Court. I don't know what you can do about that. One may decide it rightly or wrongly according to a third person's lights, and that still doesn't change the standards that are involved."

* * * * *

"I agree with Mr. Collett, this is not an adversary proceeding of any kind. I don't think that was ever considered. The very language of the statute negatives that. It is a suit to declare American citizenship.

It is true it has to have as a basis for it the fact that somebody is denied some right of citizenship. But what the Court is called upon to do is not to declare that "A" gets judgment against "B" for anything at all. By the very terms of the statute this is declaratory of citizenship.

I don't know how anybody can get away from that fact. That is what the statute says. That is the jurisdiction that is conferred, to declare

whether a person is or is not an (27) American citizen."

* * * * *

"It still is a proceeding to declare citizenship. Now, it doesn't make any difference what kind of standard you apply. I think the Court has to decide whether the person has presented sufficient evidence to show he is an American citizen. That is all."

It should also be pointed out that during that discussion counsel for defendant-appellee once again requested the trial Court to apply the "clear and convincing" rule of evidence notwithstanding the mandate of this Court. At page 215, Mr. Collett stated:

"So you don't have the matter of preponderance of the evidence involved. You have the question, has the evidence reached the point where the judge is satisfied."

Also compare remarks of counsel at pages 205, 213, 214 and 216.

A review of the proceedings held on March 11, 1955 clearly demonstrates that the trial Court did not make findings in the light of the recent decisions of this Court. The trial Court erroneously required appellant to establish his case under a burden of proof rejected by this Court. By such action, the trial Court failed to obey the mandate of this Court.

CONCLUSION.

At the conclusion of the trial had in this matter (December 9, 1952) the trial Judge expressed his feeling that the appellant, Chow Sing, was the son of Chow Yit Quong, who is a natural born United States citizen who resided in the United States prior to the birth of the appellant. By statutory law, a child born abroad of an American citizen father acquired United States citizenship and nationality at birth. Yet, in the instant case, appellant's claim is rejected. This is contrary to *Kwock Jan Fat v. White*, 253 U.S. 454, 464, where the Supreme Court stated:

“It is better that many Chinese immigrants should be improperly admitted than that one natural born citizen of the United States should be permanently excluded from this country.”

It is also clear from a reading of the record that the trial Court continued to impose a standard of burden of proof which had, by this Court, been declared inapplicable to the trial of this case. It is respectfully submitted that such action is contrary to the mandate of this Court.

Wherefore, it is requested that the decision of the trial Court be reversed and that judgment be entered in favor of appellant.

Dated, San Francisco, California,
December 2, 1955.

JACKSON & HERTOGS,
By JOSEPH S. HERTOGS,
Attorneys for Appellant.

No. 13,746

IN THE
United States Court of Appeals
For the Ninth Circuit

CHOW SING, by his guardian ad litem,
Chow Yit Quong,

Appellant,

vs.

HERBERT BROWNELL, JR., Attorney Gen-
of the United States,

Appellee.

BRIEF FOR APPELLEE.

LLOYD H. BURKE,

United States Attorney,

CHARLES ELMER COLLETT,

Assistant United States Attorney,

422 Post Office Building,

Seventh and Mission Streets,

San Francisco 1, California.

Attorneys for Appellee.

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No. 13,746

IN THE

**United States Court of Appeals
For the Ninth Circuit**

CHOW SING, by his guardian ad litem,
Chow Yit Quong,

Appellant,

vs.

HERBERT BROWNELL, JR., Attorney Gen-
of the United States,

Appellee.

BRIEF FOR APPELLEE.

The previous judgment rendered in favor of defendant was vacated by the decision of this Court, 217 F. 2d 140, and the cause was remanded "with direction to make findings as to whether Chow Yit Quong was Sing's father, such findings to be made in the light of this opinion, and thereupon enter such judgment as may be proper." The trial court, pursuant to the mandate, rendered a supplemental opinion and findings upon the remand and judgment was again entered in favor of defendant.

SPECIFICATIONS OF ERROR.

Appellant has made six specifications of error. Actually, there are but two specifications.

(1) "The trial court failed to obey the mandate of this Court" in that a standard of proof was imposed contrary to the mandate.

(2) The findings and judgment of the District Court are "clearly erroneous."

ARGUMENT.

Appellant has referred to his briefs previously filed upon the occasion of the prior appeal. Appellee likewise refers to his briefs previously filed in response to appellant.

**(1) THE DISTRICT COURT FULLY COMPLIED WITH
THE MANDATE OF THIS COURT.**

The Court found (Tr. 192):

"In substantial respects the evidence introduced by plaintiff was inconsistent and contradictory and therefore not credible. Consequently, it is not accepted as true. The burden of proving his citizenship rested upon plaintiff. To sustain that burden plaintiff had to prove by preponderating evidence that Chow Yit Quong was his father. He may be, but plaintiff did not sustain the burden of showing it. Hence for that reason the court's finding is that Chow Yit Quong is not the father of plaintiff."

(a) The burden of proof was upon the appellants to establish their claims.

Bauer v. Clark, (CA-7) 161 F. 2d 397;
Mar Gong v. Brownell, (CA-9) 209 F. 2d 448;
Elias v. Dulles, (CA-1) 211 F. 2d 520;
Brownell v. Lee Mon Hong, (CA-9) 217 F. 2d 143;
Chow Sing v. Brownell, (CA-9) 217 F. 2d 140;
Law Don Shew v. Dulles, (CA-9) 217 F. 2d 146;
Fong Wone Jing v. Dulles, (CA-9) 217 F. 2d 138;
Wong Ken Foon v. Brownell, (CA-9) 218 F. 2d 444;
Lew Wah Fook v. Brownell, (CA-9) 218 F. 2d 924;
Lue Chow Kon v. Brownell, (CA-2) 220 F. 2d 187;
U. S. ex rel. Dong Wing Ott v. Shaughnessy, (CA-2) 220 F. 2d 537;
Lee Dong Sep v. Dulles, (CA-2) 220 F. 2d 264;
Ng Kwock Gee v. Dulles, (CA-9) 221 F. 2d 942.

This Court, in reversing and remanding the previous judgment, stated:

“We hold that Sing’s burden of proof was the ordinary one.”

What constitutes the ordinary burden of proof in such a case as this was not defined. The case of *Mar Gong v. Brownell*, *supra*, was cited. The following is quoted from *Mar Gong*:

“We recognize all that may be said with respect to the necessity of the court guarding against imposition, but we are also of the view that no special quantum of proof should be exacted from any person claiming American citizenship *merely because of his racial origin.*” (Emphasis ours.)

At no time has there been a contention in any of the 903 cases that a special quantum of proof should be exacted from Chinese claimants simply because of racial origin. Judge Goodman’s opinion upon which the previous judgment was founded stated that “proof of alleged citizenship must be clear and convincing,” not as related to Chinese alone, but as to any claimant arriving at a port of entry of the United States and asserting the right to enter as a citizen by derivation under Section 1993.

Lee Sing Far v. U. S., (CA-9) 94 F. 834;

Woey Ho v. U. S., (CA-9) 109 F. 888;

Lee Sim v. U. S., (CA-2) 218 F. 432;

Ex parte Chin Him (Western D. N.Y.) 227 F. 131.

The original finding of the District Court in this case was that “the person (Sing) who claims to be plaintiff Chow Sing, has failed to introduce evidence of sufficient clarity to satisfy or convince this court that Chow Yit Quong is the natural blood father of the person known as Chow Sing or that the person (Sing) who appeared before the court claiming to be plaintiff Chow Sing is in truth and fact Chow Sing.”

On the appeal from the judgment of the District Court this Court first filed a per curiam opinion on August 18, 1954. Said opinion held "The evidence sustains the findings", and affirmed the judgment. On November 24, 1954 an opinion written by Judge Mathew, without dissent, was filed. This opinion quoted the finding of the District Court in full and held, "The finding was not clearly erroneous. We therefore accept it as correct, and conclude, as did the District Court, that Sing was not entitled to the relief sought by him." The judgment was affirmed. By order of January 17, 1955 the opinion of November 24, 1954 was amended, to state: "However, it appears that the District Court proceeded on the theory that the burden of proof resting on *Sing* was different from and heavier than the ordinary burden of proof resting on plaintiffs in civil actions—a theory which was and is untenable. We hold Sing's burden of proof was the ordinary one. As to whether he sustained that burden, we express no opinion."

The remarks of Judge Goodman during the further proceedings following the remand of the mandate must be viewed in the light of the foregoing considerations.

After considerable discussion between counsel and the court, Judge Goodman made the following comment (Tr. March 11, 1955, p. 27):

"The Court. Because of the nature of the cases. That is all there is to it.

"I agree with Mr. Collett, this is not an adversary proceeding of any kind. I don't think that

was ever considered. The very language of the statute negatives that. It is a suit to declare American citizenship.

“It is true it has to have as a basis for it the fact that somebody is denied some right of citizenship. But what the Court is called upon to do is not to declare that ‘A’ gets judgment against ‘B’ for anything at all. By the very terms of the statute this is declaratory of citizenship.

“I don’t know how anybody can get away from that fact. That is what the statute says. That is the jurisdiction that is conferred, to declare whether a person is or is not an American citizen.

“The reason jurisdiction is invoked is because some official or government has said to Jones, ‘Well, I am not going to let you vote here’, or ‘You can’t come into the United States’, or some other specific act which denied a man a right which he had if he were an American citizen.

“So the statute says, it has given the Court the authority to declare whether a man is a citizen or not. That is really the basis upon which I proceeded in trying to formulate some rule that would be helpful. Apparently the judges up above didn’t agree with that, although they have not yet held that this is an adversary proceeding of any kind.

“It is still a proceeding to declare citizenship. Now, it doesn’t make any difference what kind of standard you apply. I think the Court has to decide whether the person has presented sufficient evidence to show he is an American citizen. That is all.

“Mr. Gale. That is it.”

(2) THE JUDGMENT OF THE COURT BELOW IS NOT
"CLEARLY ERRONEOUS".

- (a) The credibility of a witness is a matter exclusively for the determination of the trial court.

Chow Sing v. Brownell, (CA-9) 217 F. 2d 140;
Mar Gong v. Brownell, (CA-9) 209 F. 2d 448;
Law Don Shew v. Dulles, (CA-9) 217 F. 2d
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Lew Wah Fook v. Brownell, (CA-9) 218 F. 2d
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Lee Dong Sep v. Dulles, (CA-2) 220 F. 2d 264;
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Ng Kwock Gee v. Dulles, (CA-9) 221 F. 2d
942;

Wong Ken Foon v. Brownell, (CA-9) 218 F.
2d 444.

- (b) The mere say-so of interested witnesses, even though uncontradicted, does not have to be accepted.

Quock Ting v. U. S., 140 U.S. 417;

Chin Yow v. U. S., 208 U.S. 8;

Marcella v. C.I.R., (CA-8) 222 F. 2d 878, 883;

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Tam Dock Lung v. Dulles, (CA-9) 218 F. 2d
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Law Don Shew v. Dulles, (CA-9) 217 F. 2d
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Woey Ho v. U. S., (CA-9) 109 F. 888;

Lee Sing Far v. U. S., 94 F. 834.

- (c) The repeated recognition by United States Courts of the incidence of fraud in Chinese claims to derivative citizenship must of itself require a judge to open his eyes and ears as to the nature of the evidence presented in support of a claim.

U. S. v. Sing Tuck—Justice Holmes, 194 U.S.
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The Chinese Exclusion Case—Justice Field, 130
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Ex parte Jew You On—Judge Bourquin, 16 F.
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Fong Ging Hung v. Acheson, (unreported)—
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Gee Fook Sing v. U. S.—Judge Hanford, 49 F.
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Lee Sing Far v. U. S.—Judge Hawley, 94 F.
 834;

Lee Sai Wing v. U. S.—Judge Rudkin, 29 F.
 2d 108;

Ly Shew v. Acheson—Judge Goodman, 110
 Fed. Supp. 50;

Mar Gong v. McGranery—Judge Westover, 109
 Fed. Supp. 821.

The Second Circuit, in *U. S. ex rel. Dong Wing Ott v. Shaughnessy*, 220 F. 2d 537, in ruling on the ground of appeal that the blood tests are unconstitutional as a violation of due process because applied discriminatorily to applicants solely of the Chinese race, held that the ground must fail for two reasons. *First*, that it is not established that they are applied solely to Chinese, and *second*, that there is sufficient evidence of unusual circumstances relating to applicants born in China during the period in question to justify a requirement of such additional evidence. The Court said, page 540:

“Such a classification based on the lack of reliable written governmental records of birth and percentage, difficulty of access to the areas from which the claimed family groups come, and long absences from the family group of the citizen father who is an identifying witness, are circumstances justifying the distinction as one not based on race or color.”

In effect appellants ask this Court to *retry* the facts, and upon application of *United States v. U. S. Gypsum Co.*, 333 U.S. 364, to reverse the trial court as “clearly erroneous.” The appellate court is not a fact finding *de novo* trial court. The court below viewed the witnesses and had the “live feel of the open forum” and its judgment is not “clearly erroneous.”

CONCLUSION.

Upon the record as presented, the findings and judgment of the court below are adequately supported by the evidence. In accordance with *U. S. v. U. S. Gypsum Co., supra*, the judgment is not "clearly erroneous" and should be affirmed. The trial court did comply with the mandate of this Court. The entire reporter's transcript of the proceedings on the hearing before the trial judge upon the mandate of this Court is contained in the record herein. The contention by appellants that the trial court failed to obey the mandate is wholly unsupported by the record.

It is respectfully submitted that the judgment of the court below be affirmed.

Dated, San Francisco, California,

April 2, 1956.

Respectfully submitted,

LLOYD H. BURKE,

United States Attorney,

CHARLES ELMER COLLETT,

Assistant United States Attorney,

Attorneys for Appellee.

